

16
No. 91-1200-CFX
Status: GRANTED

Title: City of Cincinnati, Petitioner
v.
Discovery Network, Inc., et al.

Docketed:
January 9, 1992

Court: United States Court of Appeals for
the Sixth Circuit

Counsel for petitioner: Yurick, Mark S.

Counsel for respondent: Mezibov, Marc D.

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Entry	Date	Note	Proceedings and Orders
1	Jan 9 1992	G	Petition for writ of certiorari filed.
2	Feb 10 1992		Letter from petitioner in compliance with Rule 29.1 filed.
4	Feb 14 1992		Brief of respondents Discovery Network, Inc., et al. in opposition filed.
3	Feb 19 1992		DISTRIBUTED. March 6, 1992
5	Mar 9 1992		Petition GRANTED. *****
6	Apr 16 1992		Brief amicus curiae of City of New York filed.
8	Apr 21 1992		Order extending time to file brief of petitioner on the merits until May 1, 1992.
9	Apr 23 1992		Joint appendix filed.
		*	Two volumes of Joint Appendix filed.
10	Apr 30 1992		Brief of petitioner City of Cincinnati filed.
11	May 1 1992		Brief amici curiae of U.S. Conference of Mayors, et al. filed.
12	May 29 1992		Brief amicus curiae of Learning Resources Network filed.
13	Jun 1 1992		Brief of American Newspaper Publishers, et al. filed.
14	Jun 1 1992		Brief amicus curiae of Washington Legal Foundation filed.
15	Jun 1 1992		Brief amici curiae of American Advertising Federation, et al. filed.
16	Jun 1 1992		Brief of respondents Discovery Network, et al. filed.
17	Jun 1 1992		Brief amici curiae of Association of National Advertisers, et al. filed.
18	Jun 1 1992		Brief amicus curiae of Institute for Justice filed.
19	Jul 1 1992		Reply brief of petitioner City of Cincinnati filed.
20	Jul 14 1992		CIRCULATED.
21	Jul 21 1992		Record filed.
		*	Original proceedings U. S. District Court, Southern District of Ohio (1 Box)
22	Jul 27 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Sixth Circuit.
23	Aug 21 1992		SET FOR ARGUMENT MONDAY, NOVEMBER 9, 1992. (2ND CASE).
24	Nov 9 1992		ARGUED

1992

91-1200

Supreme Court, U.S.

FILED

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DISCOVERY NETWORK, INC., et al.,
Respondents,
against
THE CITY OF CINCINNATI,
Petitioners.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

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Dated: January 11, 1992

QUESTIONS PRESENTED

1. Whether the decision below, affirming the decision of the District Court that the statutory scheme of the City of Cincinnati violated plaintiff's First Amendment rights, is in conflict with decisions of the Seventh and Eleventh Circuit and not justified under this Court's decision in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980).
2. Whether the decision below, which requires the City of Cincinnati to afford Equal First Amendment protection to both commercial and non-commercial speech publications which are distributed through the use of boxes placed in the public right of way is inconsistent with this Court's decision in *Metromedia v. City of San Diego*, 453 U.S. 490 (1987).

PARTIES

The parties to the proceeding in the Sixth Circuit Court of Appeals are:

1. The City of Cincinnati, defendants-appellants in the court below.
2. Discovery Network, Inc., doing business as Discovery Center, plaintiff-appellee in the court below.
3. Harmon Publishing Company, plaintiff-appellee in the court below.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DISCOVERY NETWORK, INC., et al.,
Respondents,

against

THE CITY OF CINCINNATI,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is printed in petitioner's appendix at pages 1a-10a. It is reported at 946 F.2d 464 (6th Cir. 1991). The opinion of the United States District Court for the Southern District of Ohio is printed in petitioners' appendix at pages 1b-17b.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 11, 1991.

This Court's jurisdiction is involved under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff Discovery Network, Inc., doing business as Discover Center, is an Ohio corporation that provides non-credit educational, recreational and social programs to interested persons in Cincinnati, Ohio for various fees. In order to sell its programs Discovery Network publishes a free "magazine" nine (9) times per year. Approximately one-third (1/3) of these "magazines" are given away to pedestrians through metal dispensing devices placed on the sidewalk in thirty-eight locations in the City of Cincinnati, Ohio.

Plaintiff Harmon Publishing Company is a New Jersey corporation registered and doing business in Ohio as a foreign corporation, which publishes and distributes free "magazines" which advertise real estate for sale in various locations. Approximately fifteen (15) percent of these "magazines" are distributed to pedestrians through the use of red plastic dispensers in twenty-four (24) locations on the public sidewalks of Cincinnati, Ohio.

"Home Magazine" published by plaintiff Harmon Publishing Company, consists primarily of listings and photographs of residential properties available in the Greater Cincinnati area, but occasionally includes information about market trends and other real estate matters. Discovery Network, Inc.'s publication contains information about the courses and programs offered at Discover Center and is intended to directly promote registration in those courses and programs. Both publications are merely advertisements focused upon attracting customers. Neither publication is a "newspaper."

Pursuant to Section 714-23 of the Cincinnati Municipal Code, the City of Cincinnati prohibits the distribution of all publications that constitute "commercial handbills," as defined in Section 714-1-C of the Cincinnati Municipal Code, on public property. Sections 911-17 and 862-1 of the Cincinnati Municipal Code, however, specifically authorize the distribution of newspapers in the public right of way.

On or about March 8, 1990 the City of Cincinnati, through its Director of Public Works, notified both plaintiffs that their publications constituted commercial handbills and ordered plaintiffs to remove their dispensing devices from the public right of way. The plaintiffs appealed the decision of the Director of Public Works to a three-member appeals committee but the decision of the Director of Public Works was upheld. Thereafter, on June 1, 1990 plaintiffs filed suit in the United States District Court for the Southern District of Ohio, Western Division, pursuant to 42 U.S.C. § 1983 claiming that the City of Cincinnati's regulatory scheme violated plaintiffs' First and Fourteenth Amendment rights of free speech and due process and seeking declaratory and injunctive relief as well as attorneys' fees.

At trial, Mr. Robert Richardson, principal city architect, testified on behalf of the City of Cincinnati. Mr. Richardson stated that among his duties he is responsible for the design and upkeep of the "streetscape" which consists of the public right of way and sidewalk area. It encompasses the sidewalk paving, lighting systems, landscaping or trees, plus any street furniture or hardware along the City right of way. In designing a streetscape system aesthetics are an important consideration. In fact, one of the major purposes for designing streetscapes is to improve the appearance of the area in order to impress visiting business people and tourists. Another major purpose for designing a streetscape is to support private development. Since the City is in competition with other cities to attract development and retain business, keeping the public portions of the streets aesthetically pleasing is important to the City's continuing vitality.

Dispensing devices such as those utilized by plaintiffs, detract from the effectiveness of the streetscaping plans. Streetscapes are designed, starting with the lighting systems and what amount of light is needed in relation to where foundations are or may be situated. Traffic signals are also an important consideration. Everything, including parking signs, parking meters, trash receptacles, and transformer boxes, is in-

corporated into the streetscape. However, dispensing devices are not designed into the system. The devices are often randomly placed, interfering with crosswalks and handicap ramps, and are also attached to light poles with bare chains which cause the poles to rust. In Mr. Richardson's opinion, therefore, dispensing devices such as those utilized by plaintiffs, detract from the aesthetics of the streetscape.

Mr. Thomas Young, City Engineer, also testified at trial on behalf of the City of Cincinnati. Mr. Young stated that the engineering division is charged with designing and regulating the use of the public right of way including streets, sidewalks, bridges, and other structures within the right of way. In Mr. Young's opinion, the type of dispensing device utilized by plaintiffs may detract from the safety of the right of way in several respects. First, they may be placed within, or too close to, crosswalks so that they may hinder pedestrian traffic. Second, they may also obstruct handicap ramps. Third, they obstruct the visibility of motorists and pedestrians, particularly small children who are pedestrians. Last, they may be placed so that they generally restrict the use of the sidewalk.

The United States District Court for the Southern District of Ohio (Spiegel, J.) held that the application of Cincinnati's statutory scheme violated plaintiffs' First Amendment rights of free speech and consequently violated 42 U.S.C. Section 1983. The District Court ruled in the City's favor on the due process claim. (1b).

The District Court found that plaintiffs' publications constituted commercial speech since both publications propose commercial transactions and are primarily advertisements. Neither publication contains noncommercial speech that is inextricably intertwined with commercial speech. (6b). Therefore, the test advanced by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), controlled. (7b).

The Court found that the City of Cincinnati may regulate publication dispensing devices pursuant to its substantial

government interest in promoting safety and aesthetics on or about the public right of way under *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). (7b). However, the District Court found that the prohibition of commercial handbills on a public right of way is an "excessive means" by which to accomplish the governmental objectives of safety and aesthetic appeal. (8b). Noting that the number of commercial handbill dispensers on Cincinnati's public rights of way was small in comparison to the number of newspaper dispensing devices, the Court stated that commercial speech dispensers affected public safety and aesthetics in "only a minimal way." (8b). The District Court also noted that other communities chose to deal with safety and aesthetic problems by regulating the size, shape and color of various dispensing devices. The District Court held that the City of Cincinnati's statutory scheme did not reasonably fit the governmental objectives of safety and aesthetics sought to be promoted, as required by *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). (8b). The parties had previously stipulated that plaintiff's advertisements concerned lawful activities and were not misleading.

The Sixth Circuit Court of Appeals affirmed the decision of the District Court. (17a). The Court, in fact, went beyond the holding of the District Court and held that commercial speech may be regulated differently than non-commercial speech only when the regulations deal with the content of the speech itself, or with distinctive effects that the content of the speech will produce. (10a). The Court noted that *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490 (1981) held that a San Diego ordinance similar in effect to the City of Cincinnati's ordinance was a permissible regulation of commercial speech, but since *Metromedia* was a plurality opinion on that issue the Sixth Circuit Court did not consider the case binding on that point. (10a at n. 9).

The Court went on to state that all commercial speech regulations that had been upheld sought to ban speech which was itself believed to be inherently false or misleading, or the

regulation sought to alleviate adverse effects allegedly caused by and directly flowing from the type of speech regulated. (11-12a). Since the City of Cincinnati's statutory scheme was not directed toward either of these objectives, the scheme did not "reasonably fit" the governmental objective sought to be advanced absent some content based restriction. (13a). However, the Sixth Circuit held that the City would have to treat both commercial and noncommercial publications similarly. (14a). No preference for noncommercial speech due solely to its noncommercial nature is permitted by the Sixth Circuit Court's decision. Rather, commercial and noncommercial publications must be afforded equal First Amendment protection absent a content based restriction.

Further, the Court held that the City's statutory scheme did not qualify as a reasonable time, place or manner restriction, since it was not "content neutral." (14a). In so holding the Court noted that the City could not treat dispensing devices distributing advertisements differently from devices distributing commentary or public affairs. (15a).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CREATES A CONFLICT BETWEEN CIRCUIT COURTS AS TO THE CORRECT INTERPRETATION OF *CENTRAL HUDSON* AND THE DEGREE OF FIRST AMENDMENT PROTECTION TO BE AFFORDED COMMERCIAL SPEECH.

The decision below is in conflict with the Seventh Circuit decision in *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991), and the 11th Circuit decision in *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), which treat advertising material differently from noncommercial speech for purposes of First Amendment protection. Resolution of this conflict is vital for proper application of the *Central Hudson* test. In many cases, interpretation of this test will be outcome determinative. The case is also significant for the City of Cincinnati since there is increasing competition between commercial publications and noncommercial publications for a finite number of spaces upon the public right of way. The City of Cincinnati must have some principled basis for discriminating between requests from commercial and noncommercial publications, or it will be forced to treat these publications in an equal manner, giving each publication an equal degree of First Amendment protection, and affording no preference to noncommercial speech publications.

In *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991), the Seventh Circuit upheld an ordinance of the City of Chicago, Illinois, banning off-premises ads attached to newsracks. In *Chicago Observer*, plaintiff newspaper distributed its publication through the use of box-type dispensing devices. *Id.* at 326. The boxes served as billboards for businesses unrelated to the newspaper. The

advertising posters faced pedestrian traffic, *Id.* The boxes themselves were referred to by the *Observer* as AD-BOXES. Advertising messages were displayed through a plexi-glass display. *Id.* at 327.

On July 12, 1990 the City Council of the City of Chicago enacted an ordinance which significantly banned off-premises ads on the public way, including off-premises ads attached to newsracks. *Id.*

The Seventh Circuit upheld the ordinance as a permissible restriction of commercial speech. Citing *City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984), the Court held that cities may curtail visual clutter for aesthetic and safety reasons. *Id.* at 328. The City may conclude that large newsracks may reduce the quality of life. The Court noted that Chicago was not seeking to regulate the viewpoint of publications, it was concerned only with size and advertising. The Court rejected the *Observer's* argument that the ads could be regulated only as part of a comprehensive beautification plan, and noted that alternative channels of communication were open. *Id.* at 328.

The Sixth Circuit, however, would require the City of Cincinnati to regulate the content or viewpoint of commercial speech publications by banning only those which are perceived as having some ill effect upon the populace. Furthermore, the Sixth Circuit would seriously impair Cincinnati's ability to curtail visual clutter for aesthetic and safety reasons. The only factual difference between the two situations is that the *Observer's* ads were attached to the outside of the boxes, whereas plaintiff's advertisements are located within their boxes. This factual difference is of no legal significance.

Similarly, in *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), the Eleventh Circuit upheld a City of Clearwater ordinance which banned the use of portable signs. In applying the *Central Hudson* test the Court noted that a partial solution to a City's safety or aesthetic

problems may directly advance the City's goals. *Id.* at 1053. The Constitution, the Court noted, does not require a city to choose between curing all of its aesthetic problems or curing none at all. *Id.*

Furthermore, the Court noted that the total ban on portable signs did not violate the fourth prong of the *Central Hudson* test. *Id.* at 1054. The Court noted:

"If the City has a sufficient basis for believing that billboards are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Id.* (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981)).

The Sixth Circuit, however, would not permit the City of Cincinnati to ban advertising boxes even assuming the City has a sufficient basis for believing that such boxes are unattractive. Rather, the City must devise some less restrictive method of addressing its concerns in order to establish a reasonable fit between its objectives and its regulatory means. Additionally, the Sixth Circuit decision forces the City of Cincinnati to address all of its aesthetic concerns, or none at all. The Sixth Circuit stated:

If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances, then Cincinnati's ordinance cannot be a 'reasonable fit.' Plaintiffs will bear a very heavy burden by being completely deprived of access to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance, Harmon, 15%. The benefit gained by the city, on the other hand, is miniscule. Plaintiffs own only 62 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden placed on it by Cincin-

nati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance.

This sort of balancing test is not indicated by the case law. Furthermore, a governmental body would be prevented from addressing only one aspect of its safety and aesthetic concerns, since attacking only a small portion may result in only a "paltry" gain or a "miniscule" benefit forcing the body to address all of its concerns or none at all.

The Sixth Circuit's opinion, therefore, creates a conflict between the circuits as to the interpretation of the First Amendment, particularly with respect to the *Central Hudson* test. In doing so, moreover, the Court below erred, neglecting prior decisions of this Court and according unnecessary protection to commercial speech at the expense of noncommercial speech.

II.

THIS CASE POSES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THE SIXTH CIRCUIT COURT OF APPEALS HAS DECIDED IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Sixth Circuit Court of Appeals erred in requiring the City of Cincinnati to treat commercial and noncommercial speech equally with regard to distributing publications upon the public right of way. Significant in this regard are this Court's decisions in *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

There is a distinction drawn between the First Amendment protection to be afforded to commercial, as opposed to non-commercial speech. As this Court noted in *Ohralik v. Ohio State Bar Assoc.*:

To require parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process of the face of the amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expressions. 436 U.S. at 456.

The test for constitutionality of a commercial speech regulation is set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). A governmental restriction on commercial speech is valid if: 1) the commercial speech concerns lawful activity and is not misleading; 2) regulation advances a substantial governmental interest; and 3) the regulation reaches no fur-

ther than necessary to accomplish the legitimate governmental objective. *Id.* 447 U.S. at 563-66. This test does not require that the regulation be the least restrictive means available to further the interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). This Court stated in *Fox*:

"None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive. *Id.* 492 U.S. at 479.

This Court also noted in *Fox* that courts should not second-guess the legislature as to what constitutes an adequate measure as long as the legislative decision is reasonable. *Id.*

In *Metromedia, Inc. v. City of San Diego* this court held that San Diego's ban on signs carrying non-commercial advertising was violative of the First and Fourteenth Amendments. The fact that the City valued commercial messages relating to onsite goods and services more than it valued commercial communications relating to offsite goods and services did not justify prohibiting an occupant from displaying its own non-commercial messages or those of others. *Id.* 453 U.S. at 512-13. This court stated:

"Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages." *Id.* at 513.

Further, this court held that the ordinance was a permissible restriction on commercial speech under the test established by *Central Hudson*. *Id.* at 512. Seven justices of this Court concurred in this portion of the holding (Justice White,

Justice Stewart, Justice Marshall, Justice Powell, Justice Rehnquist, Justice Stevens, and Chief Justice Burger).

However, the Sixth Circuit explicitly ignores the holding of *Metromedia* because it is a plurality opinion and therefore not technically binding. (10a at n.9) Instead, the Sixth Circuit develops its own test based upon the perceived ill effects of the content of commercial speech sought to be regulated. *Central Hudson* does not require governmental bodies to examine the content of commercial speech sought to be regulated.

Further, the Sixth Circuit would mandate that the City of Cincinnati treat commercial and non-commercial publications alike for purposes of regulating their impact on the safety and aesthetics of the public way. *Metromedia* and *Ohralik* would appear to forbid this parity, and, in fact, would require preference for the non-commercial publication.

CONCLUSION

If the City of Cincinnati must treat commercial and non-commercial publications equally for regulatory purposes, it is quite possible that a commercial publication will be afforded limited sidewalk space to the exclusion of a non-commercial publication, such as a newspaper. In that instance, commercial speech would enjoy a higher degree of First Amendment protection than non-commercial speech. This appears contrary to all of the Court's prior precedent in this area.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3817

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCOVERY NETWORK, INC. and
HARMON PUBLISHING CO.,
Plaintiffs-Appellees,

v.

CITY OF CINCINNATI,
Defendant-Appellant.

ON APPEAL from the
United States District
Court for the Southern
District of Ohio

Decided and Filed October 11, 1991

Before: KRUPANSKY and BOGGS, Circuit Judges;
and DUGGAN, District Judge.*

BOGGS, Circuit Judge. The case involves the constitutionality of Cincinnati's ordinance prohibiting the distribution of commercial handbills on public property. This ordinance effectively grants distributors of "newspapers," such as the *Cincinnati Post*, *USA Today*, and the *Wall Street Journal*, access to the public sidewalks through newsracks, while denying that same access to distributors of "commercial handbills." The district court

*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

rendered a judgment preventing enforcement of this ordinance because it violates the first amendment. The city appealed, arguing that the ordinance was constitutionally permissible as a regulation of "commercial speech" because of the "lesser protection" such speech is afforded under the first amendment. Because we believe that "commercial speech" only receives lesser first amendment protection when the governmental interest asserted is either related to regulating the commerce the "commercial speech" is promoting, or related to any distinctive effects such commercial activity would produce, and neither governmental interest is asserted here, we affirm the district court.

I

Plaintiffs are publishers of publications distributed throughout the Cincinnati metropolitan area. Discovery Network publishes a magazine that advertises learning programs, recreational opportunities, and social events for adults. Harmon Publishing publishes and distributes *Home Magazine*, which lists houses and other residential real estate for sale or rent. Both plaintiffs use newspaper dispensing devices ("newsracks") placed on public right-of-ways to distribute their publications.

Both plaintiffs had been given permission by the city to place newsracks along public right-of-ways to distribute their publications according to Amended Regulation 38.¹

¹The Amended Regulation reads in pertinent part as follows:

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device The site plan and request to place newspaper vending device [sic] in public right-of-way [sic] must be presented to and approved by the City Manager or his designee prior to the placement of the device
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap

Their status changed, however, in February 1990 when the City Council passed a motion requiring the Department of Public Works to enforce the existing ordinance prohibiting the distribution of "commercial handbills" on public property. *Cincinnati Municipal Code* § 714-23.² Plaintiffs brought suit under 42 U.S.C. § 1983, requesting declaratory and injunctive relief. This case ultimately came before the district court for an evidentiary hearing on two issues: whether the regulation violated plaintiffs' first amendment rights, and whether the city's mechanism for appealing the administrative decision to enforce the ordinance violated plaintiffs' right to due process.

The court held that hearing on July 9, 1990. In that hearing, the city contended that the newsracks pose aesthetic and safety problems for the city. The aesthetic

access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems

6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person . . . with the City Manager This contact person shall be able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

²A "commercial handbill" is defined as:

any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

- (a) which advertises for sale any merchandise, product, commodity or thing; or
- (b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or
- (c) which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

Cincinnati Municipal Code § 701-1-C.

problems arise because of the non-uniform design and color schemes of the different types of newsracks. The safety problems arise because the racks are placed near busy streets, especially near crosswalks and bus stops. They are also attached by chains to city fixtures, such as lightpoles, causing the fixtures to rust. However, there are currently no city regulations establishing any safety or aesthetic standards for newsracks.

Neither the City Architect nor the City Engineer could distinguish the commercial from the non-commercial newsracks. In fact, the Architect testified that the city's aesthetic concerns would be alleviated by an ordinance regulating the color and size of all newsracks. Both witnesses seemed primarily concerned about the potential proliferation of the total number of newsracks as a result of newsracks distributing commercial speech. The Engineer testified that the only areas in which commercial newsracks differed from non-commercial newsracks was in the potential for proliferation, and in the enhanced first amendment protection accorded to devices dispensing non-commercial publications. He believed such proliferation was likely because he had received four requests for permits from commercial publishers for newsrack permits in the prior two years, the first such requests he had ever received.³ The Architect's testimony followed the Engineer's, as he believed that permitting plaintiffs' newsracks to remain would send a signal to other commercial publishers that newsracks were a permissible way to distribute the publications, thereby

³This argument rests on the assumption that there is an infinite number of commercial publishers who might seek permits, but only a finite number of non-commercial publishers. In light of the growing nationalization of newspapers in this country, that assumption is somewhat tenuous at best. The city provided no direct evidence regarding the increase in the number of non-commercial publishers dispensing their wares through newsracks. However, the Architect testified that "it was not very long ago that the *Cincinnati Post* and the *Cincinnati Enquirer* were the only ones with dispensing devices on the City streets." We take judicial notice of the fact that *USA Today*, the *New York Times*, the *Wall Street Journal*, and the *Business Courier* all have dispensing devices on the corner across from the Federal Courthouse.

increasing the number of racks.

The court ruled in favor of the city on the due process claim, but in favor of the plaintiffs on the first amendment claim. The court reached many conclusions of law: that the publications were commercial speech within the meaning of the first amendment because they proposed commercial transactions in the form of advertisements;⁴ that commercial speech was entitled to first amendment protection where, as here, the activities promoted were lawful and the speech itself not inherently misleading; and that the ordinance would be measured against the four-part test announced by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). That test provides that a government regulation will be upheld if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and, (4) is not more extensive in its regulation of speech than is necessary to serve that interest. *Id.*

The court focused its analysis on the last part of that test. The court applied the Supreme Court's interpretation

⁴In this case, plaintiffs do not question the contours of the delineation between "commercial" and "non-commercial" speech. We will thus adopt and adhere to that terminology, although we find it somewhat anomalous to denominate as "non-commercial" institutions such as the *New York Times* and Gannett (publisher of the *Cincinnati Post*), each of which has assets and revenues in the billions of dollars, and profits in the many millions of dollars.

Obviously, a quite significant part of the space in "newspapers" is devoted to purely commercial activities, while publications such as plaintiffs' may (and certainly could easily) contain some editorial material, such as comments or articles on education or real estate matters. The first amendment by its terms does not make this distinction; it protects "speech." An analogous practice, deciding on content-based grounds which beliefs merit classification as "religion" protected by the establishment and free exercise clauses of the first amendment, has been severely limited by courts to avoid impermissible government interference into protected activity. See *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Ballard*, 322 U.S. 78 (1944). See also G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, *Constitutional Law* 1369-73 (1986).

of the fourth part of the *Central Hudson* test in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). The *Fox* Court stated that a regulation is not more extensive than necessary when it is a reasonable fit between the ends directly advanced by the statute and the means chosen as embodied in the regulation. *Fox*, 492 U.S. at 480. The Court held that the government has the burden of proving the reasonableness of that fit. *Id.*

The district court's analysis led it to conclude that the city's ordinance did not constitute a reasonable fit between its asserted ends and the means chosen. The court held that a complete ban on newsracks distributing commercial speech violated the *Fox* test. Only 62 of the between 1,500 and 2,000 newsracks present on the city's streets belonged to the plaintiffs. Based on the city's concession that newsracks dispensing "non-commercial" papers caused the same problems as those distributing commercial papers, the court held that the regulation was an excessive means to accomplish the stated ends.

Cincinnati timely appealed the court's determination.⁵

II

A

Both parties agree on the legal contours within which this case must be decided. Both parties agree that this case requires the application of the four-part *Central Hudson* test, and the interpretation given by the Supreme Court to the fourth part of that test in *Fox*. Both parties agree that this ordinance satisfies the first two parts of the test: in this case it regulates purely commercial speech,⁶

⁵The plaintiffs have not cross-appealed from the court's judgment for the city on the due process claim.

⁶However, it should be noted that the ordinance can also be applied to "newspapers." All newspapers advertise products for sale, or direct attention to business establishments for the purpose of directly or indirectly promoting the sales thereof (restaurant or theater reviews), or direct attention to events of any kind for which an

and Cincinnati's interests in street safety and city aesthetics are substantial. As it is clear that the ordinance directly advances the purposes asserted, we have only one issue before us: Does Cincinnati's ordinance banning the distribution of commercial handbills along city streets and sidewalks prescribe a "reasonable fit" between the ends asserted and the means chosen to advance them? We hold that it does not.

B

In establishing the "reasonable fit" requirement, the Court in *Fox* attempted to draw a middle ground between greater and lesser review of a regulation of commercial speech. The Court expressly rejected imposing either a "least restrictive means" or a "rational basis" standard of review on regulations of commercial speech. *Fox*, 492 U.S. at 479-81. The Court rejected the least restrictive means approach as inconsistent with its prior commercial speech jurisprudence, and rejected the rational basis approach because "[t]here it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost." *Fox*, 492 U.S. at 480. The Court described its "reasonable fit" approach as one "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' Here we require the government goal to be substantial, and the cost to be carefully calculated." *Id.* We presume that the cost referred to by the *Fox* Court is that which would accrue because of the burden placed on the commercial speech, and that the *Fox* test requires that such costs must be outweighed by the benefits of the asserted regulation. We can only make that calculation if we know what value the Court has placed on commercial speech, and it is to that consideration that we now turn.

admission fee is charged for the purpose of private profit (Reds or Bengals games).

C

Commercial speech has unquestionably been protected by the first amendment since the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), held that the Court's prior offhand statement in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that "purely commercial advertising" was not protected did not establish an exception to first amendment protection. The Court recognized in *Virginia Citizens* that commercial speech, though it may not touch upon the highest topics of human existence (indeed, much protected speech does not), is important to the public welfare. The Court noted in *Virginia Citizens* that speech uttered solely for economic motives has high value to those who listen to it. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Citizens*, 425 U.S. at 763. In recognizing the importance of commercial speech to private economic activity, the Court was once again affirming that the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge" is "essential to the orderly pursuit of happiness by free men." *Board of Regents of State College v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court recognized that having made this decision, one with which we have no quarrel, commercial advertising is essential because it conveys information that permits each person to decide which trades and economic decisions are best for that person. See *Virginia Citizens*, 425 U.S. at 764. "Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." *Id.* at 765. As such, commercial speech also has a high value to the society as well.

The Court did not mean to free commercial speech from

all regulation and create some sort of an advertiser's paradise. The Court noted that time, place, and manner restrictions could be applied to commercial speech, provided that such restrictions are content-neutral. *Virginia Citizens*, 425 U.S. at 771. False and misleading speech could also be regulated or banned, *id.*, including types of commercial speech that may merely be likely to deceive the public. Also, speech proposing illegal commercial transactions may be banned. *Id.* at 772. As at least the prior regulation of speech considered potentially false or misleading would be impermissible if applied to political speech, the Court's decision effectively left commercial speech with lesser protection than that afforded to other types of speech. The Court has continued to adhere to these principles in its subsequent commercial speech jurisprudence. See *Central Hudson*, 447 U.S. at 563-64.

This "lesser protection" afforded commercial speech is crucial to Cincinnati's argument on appeal. Cincinnati argues that placing the entire burden of achieving its goal of safer streets and a more harmonious landscape on commercial speech is justified by this lesser protection. The city correctly notes that many courts have held that a city cannot ban newsracks containing traditional newspapers that comment on current affairs, thereby precluding it from alleviating its problem by completely banning newsracks from the city.⁷ It asks us to hold that, in light of that restriction, its policy of banning only newsracks distributing commercial speech is a cost-effective way of alleviating its problem, and therefore meets the *Fox* test.⁸

⁷See *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991), and cases cited therein.

⁸Cincinnati also argues that we should defer to the city's decision so long as it is reasonable. It draws this conclusion from two sentences in *Fox* that "we have been loath to second-guess the Government's judgment," *Fox*, 492 U.S. at 478, and that "[w]ithin those bounds [the reasonable fit test] we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. We do not believe that these

The fact that commercial speech is owed less protection than is political speech does not lead to Cincinnati's conclusion that commercial speech has a low value in first amendment jurisprudence. "While [the plaintiff's] speech is primarily commercial in nature, and thereby not subject to all of the traditionally stringent protections of the first amendment, it is nevertheless entitled to substantial protections." *American Motors Sales Corporation v. Runke*, 708 F.2d 202, 208 (6th Cir. 1983). Our examination of that jurisprudence shows us that the lesser value placed on commercial speech only justifies regulations dealing with the content of the speech itself, or with distinctive effects that the content of the speech will produce. In every commercial speech case but one,⁹ a regulation upheld as constitutional by the

statements command us to give the city the benefit of the doubt in close cases, as Cincinnati would have it. Rather, they are meant to distinguish the Court's test in *Fox* from the least restrictive means test urged on the Court by the defendant. A least restrictive means test can be satisfied by only one method of regulation, while the *Fox* test can be satisfied by many different methods. If the Court's words mean what Cincinnati argues they do, then the *Fox* Court's subsequent rejection of the fourteenth amendment rational basis test would be a glaring inconsistency.

⁹That one case is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Metromedia*, the Court overturned an ordinance that banned outdoor, off-site advertising displays as an attempt to increase traffic safety and enhance appearance. These interests are very similar to those advanced by Cincinnati in defense of its ordinance. The ordinance at issue in *Metromedia* is also the only regulation of commercial speech that has yet come before the Court where a government attempted to do what Cincinnati is trying so here, regulate a manner of conveying commercial speech in order to combat perceived evils wholly unrelated to the commercial content of that speech. Thus, if the majority of the Court had upheld San Diego's statute as a permissible regulation of commercial speech, we would be compelled to reverse the district court. However, only a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech. The concurrence specifically -- and vehemently -- disagreed with that conclusion. See *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). The Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech. *Metromedia*, 453 U.S. at 521. As the Court has stated that "when no single rationale commands a majority, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds," *City of Lakewood v. Plain*

Court fell into one of two groups. In the first, the regulation sought to ban speech believed to be inherently false or misleading.¹⁰ In the second group, the regulation sought to alleviate distinctive adverse effects allegedly caused by and directly flowing from the type of commercial speech regulated.¹¹ It is clear that Cincinnati's ordinance does not attempt to regulate

Dealer Publishing Co., 486 U.S. 750, 764 n.9 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)), we do not view the plurality dicta in *Metromedia* as controlling the outcome of this case.

¹⁰See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)(regulation banning the use of illustrations in lawyer advertising and banning statements in such advertisements offering legal advice and information as misleading unconstitutional; regulation requiring disclosure that legal "fees" and "costs" are distinct financial obligations in retaining a lawyer to avoid misleading public constitutional); *Friedman v. Rogers*, 440 U.S. 1 (1979)(statute prohibiting the advertisement of optometry practices through trade names as misleading constitutional). The Court also ruled many regulations to be unconstitutional in this group. See *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281 (1990)(regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982)(regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleading unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)(regulation banning lawyer advertisement of prices for routine legal services as misleading unconstitutional).

¹¹See *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)(statute banning advertising of casino gambling directed to Puerto Rico residents to prevent bad effects on morals of residents constitutional); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)(regulation banning in-person solicitation of accident victims for legal business because victims may be coerced into hiring lawyer constitutional); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)(regulation setting different zoning regulations for pornographic theatres or bookstores to prevent neighborhood deterioration and crime increases constitutional). The Court has also declared many regulations to be unconstitutional that fall into this category. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)(regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Bolger, et al. v. Youngs Drug Product Corp.*, 463 U.S. 60 (1983)(statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *Central Hudson* (statute preventing promotional advertisement by electric utility to conserve energy unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)(regulation banning

plaintiffs' speech because it is false or misleading. Therefore, plaintiffs' speech receives lesser first amendment protection only if Cincinnati's reason for regulating it falls into the second group of cases. We can best demonstrate what sort of rationale for regulation is included in the second group by listing a few examples.

In each case where the Court *upheld* a regulation on commercial speech that attempted to burden that speech because of perceived adverse effects on the community, those effects flowed naturally from personal actions fostered by the commercial content of the speech itself. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Detroit passed a zoning ordinance requiring sexual entertainment establishments to be at least 1000 feet apart from one another. The city believed that permitting such establishments to be closer would foster crime, prostitution, and neighborhood decay. However, the adverse effects of increased crime, prostitution, and neighborhood decay would allegedly occur because of the sort of person attracted to the location of these businesses. Also, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Commonwealth banned advertising of casino gambling that was directed at or detectable by Puerto Rican citizens. The reason given was that fostering gambling among Puerto Ricans would disrupt moral and cultural patterns, increase crime and prostitution, and foster organized crime and corruption. These problems, however, would all arise because Puerto Ricans would be more likely to frequent casinos and gamble if they were exposed to casino advertising. In each case, the adverse effect would occur as a direct result of persons acting upon the

advertisement of prices for routine legal services because of concern that legal professionalism will decline unconstitutional); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977)(regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); *Virginia Citizens* (statute banning price advertising by pharmacists because of concern that pharmacists' professionalism would decline unconstitutional).

commercial *content* (availability of sexual entertainment, availability of casino gambling) of the speech regulated.

These observations destroy Cincinnati's argument in favor of its ordinance. The defense of that ordinance rests solely on the low value allegedly accorded to commercial speech in general. However, we observe that the Court actually accords a high value to commercial speech except in the two specific circumstances outlined above. Neither of them are present here. Cincinnati is not regulating the content of plaintiffs' publications. Neither is Cincinnati attempting to alleviate a harm caused by the content of the publications. Cincinnati is attempting to place a burden on a particular type of speech because of harms caused by the *manner* of delivering that speech. "We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Central Hudson*, 447 U.S. at 566 n.9. Cincinnati's non-speech related policy does not survive that special review.

If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances, then Cincinnati's ordinance cannot be a "reasonable fit." Plaintiffs will bear a very heavy burden by being completely deprived of access to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance; Harmon, 15%. The benefit gained by the city, on the other hand, is miniscule. Plaintiffs own only 62 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden placed on it by Cincinnati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance. While Cincinnati argues that this is the best option open to it in light of the protection afforded to newsracks dispensing traditional newspapers, "the First Amendment does not permit a ban on certain speech merely because it is more efficient" than other alternatives. *Shapero*, 486 U.S. at 473.

In contrast to Cincinnati's fears, it has many options open to it to control the perceived ill effects of newsracks apart from banning those dispensing commercial speech. To the extent that the use of chains to fasten the newsracks is unsafe, a regulation requiring that all newsracks be bolted to the sidewalk would solve the problem. To the extent that aesthetics are a concern, a regulation establishing color and design limitations upon all newsracks would fit the bill. In fact, counsel for Cincinnati admitted at oral argument that it is currently working on an ordinance of this sort with representatives of traditional newspapers. To the extent that the number of newsracks is disturbing, the city can establish a maximum number of newsracks permitted on city sidewalks, and distribute them either through first-come, first-serve permit rationing or by selling permits to the highest bidder. We are confident that many more options exist for the city, so long as they do not treat newsracks differently according to the content of the publications inside.

III

We also write briefly to explain why Cincinnati's ordinance does not pass constitutional muster on other grounds. The ordinance treats newsracks differently on the basis of the commercial content of the publications distributed. Cincinnati's ordinance, therefore, cannot qualify as a constitutional time, place, and manner restriction because it is not content-neutral. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Rzadkowsky v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586, 590 (6th Cir. 1987) ("the Billboard Act and regulations apply evenhandedly to commercial and non-commercial speech; they discriminate against no view or subject matter"). A content-neutral speech regulation is one "justified without reference to the content of the regulated speech," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Cincinnati's argument on

appeal, in contrast, relies on the lesser protection allegedly accorded to commercial speech.¹²

Cincinnati could argue that its ordinance is content-neutral because it was not "adopted . . . because of disagreement with the message [the regulated speech] conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Cincinnati could argue that its enforcement of the ordinance is directed solely at the aesthetic and safety problems caused by newsracks, and therefore is not a content-based decision. However, we cannot accept that argument for two reasons. First, Cincinnati's position is based on the argument that it can treat newsracks distributing commercial speech differently than those distributing commentary on public affairs. Given the wide range of options open to the city to control the perceived ill effects of newsracks without completely banning those distributing commercial speech, we find it

¹²Nor does Cincinnati's ordinance qualify as content-neutral under the "secondary effects" doctrine promulgated by the Court in *Playtime Theatres*. There, the city enacted a zoning ordinance keeping sexual entertainment movie theaters 1,000 feet apart from a residential zone, church, or park, and one mile from any school. The Court in *Playtime Theatres* stated that the ordinance was content-neutral, and therefore reviewable under the time, place, and manner regulation standard, because the primary concern of the city in enacting the ordinance was to control the secondary effects caused by the theaters. *Playtime Theaters*, 475 U.S. at 48. While Cincinnati is attempting to control effects on the city's landscape and fixtures, these effects are neither secondary nor caused by the speech being regulated. In *Playtime Theaters*, the effects -- increased crime and decreased neighborhood quality, among others -- were secondary to the primary effect of the theaters; the dissemination of sexually explicit entertainment. Here, the very existence of different types of newsracks causes aesthetic problems for the city. Additionally, in *Playtime Theaters*, the effects were caused by the nature of the speech disseminated in the theaters. Here, the effects newsracks may have on the city's aesthetic and safety interests are the same for all newsracks, whether the publications inside are commercial or non-commercial speech.

Had Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, such as the clogging of downtown streets caused by auto buffs crowding around to obtain the latest issue of *Auto World*, the ordinance may have been constitutional under the secondary effects doctrine. This, however, is not the case.

hard to believe that the city does not in fact favor the distribution of newspapers such as the *Cincinnati Post* and the *Cincinnati Enquirer* on its street corners over that of *Home Magazine*. The failure of the city to even include representatives of plaintiffs -- and other publishers of commercial publications -- in its ongoing discussions with newspaper representatives regarding aesthetic and safety regulations governing newsrack appearance and fastening provides further proof of an unadmitted bias against commercial speech.¹³ Second, Cincinnati's hypothetical argument only addresses the enforcement of the ordinance. The ordinance itself was on the books long before this problem supposedly arose. There is no argument advanced that the ordinance's ban on distribution of commercial handbills, by any method, not merely by newsracks, was not directed against commercial speech based on its content.¹⁴

Nor can the ordinance pass muster as a valid content-

¹³The Architect's testimony is illuminating on this point.

Q: Does the City have means to deal with the proliferation of non commercial publishers who are seeking City permits?

A: The City is attempting to work cooperatively with the non commercial publishers to place the devices in an orderly manner and in some cases to agree to certain standard devices, particularly in the center business district.

Q: Can't those very same regulations be applied to commercial publishers?

A: They could if commercial publications were considered legal.

¹⁴Cincinnati's ordinance would not pass muster even if it met the requirement that it be content-neutral. The second part of the time, place, and manner standard is that the regulation be "narrowly tailored to serve a significant governmental interest." *Rock Against Racism*, 491 U.S. at 796 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The ordinance is not narrowly tailored because there are many options available to the city that would address its aesthetic, safety, and proliferation concerns without placing the significant burden on commercial speech that the ordinance does. See *supra*, at pp. 12-13. None of these options would be less effective in promoting the asserted interests than is the complete ban on distribution of commercial handbills. See *Rock Against Racism*, 491 U.S. at 799-800.

based restriction. "Content based restrictions 'will be upheld only if narrowly drawn to accomplish a compelling governmental interest.'" *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (White, J., dissenting) (quoting *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989)). This standard has been interpreted to require a government to choose the least restrictive means to further the governmental interest. *Sable Communications*, 492 U.S. at 126. The ordinance is clearly not the least restrictive means, as it places a substantially greater burden on commercial speech than is necessary to alleviate the city's aesthetic and safety concerns.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

—
No. C-1-90-437
—

DISCOVERY NETWORK, INC., et al.,
Plaintiffs,

vs.

CITY OF CINCINNATI,
Defendants.
—

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**
(Filed August 23, 1990)

This matter came before the Court for an evidentiary hearing on July 9, 1990. This is a civil action brought pursuant to 42 U.S.C. § 1983. The plaintiffs allege that defendant City of Cincinnati's statutory scheme prohibiting the distribution of commercial handbills in the public right of way violates plaintiffs' First Amendment right to freedom of speech and Fourteenth Amendment right to procedural due process. The plaintiffs seek declaratory and injunctive relief. The contested issues of law and fact relate to whether plaintiffs' publications are commercial speech, whether defendant's regulatory scheme violated plaintiffs' First Amendment rights, and whether defendant failed to provide a meaningful opportunity for plaintiffs to gain rescission of defendant's directives. We find that plaintiffs' publications constitute commercial speech, that defendant's statutory scheme violates plaintiffs' First Amendment rights, and that defendant did not fail to provide a meaningful opportunity for plaintiffs to appeal the defendant's directives.

In rendering our decision on this matter, we have considered the testimony of the witnesses, the documents ad-

mitted into evidence, plaintiffs' trial brief (doc. 9), defendant's trial brief (doc. 6), the proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 8) and the defendant (doc. 7), and the supplemental proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 14) and the defendant (doc. 13). In weighing the testimony of the witnesses, we considered each witness' relationship to the plaintiff or the defendant; their interest, if any, in the outcome of the trial; their manner of testifying; their opportunity to observe or acquire knowledge concerning the facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence.

Pursuant to Fed. R. Civ. P. 52, we set forth our findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The plaintiff, Discovery Center, is an Ohio corporation that, for a fee, provides non-credit educational, recreational and social programs to interested individuals in the greater Cincinnati, Ohio area.

2. The plaintiff, Harmon Publishing Company, is a New Jersey corporation registered and doing business as a foreign corporation in Ohio which publishes and distributes magazines advertising real estate in various locations throughout the United States, including the greater Cincinnati, Ohio area.

3. Discovery Center promotes and publicizes the nature and availability of its programs by means of a free magazine published nine (9) times per year. Approximately one-third (1/3) of these magazines are distributed to the public through free-standing, metal dispensing devices situated in thirty-eight (38) locations within the City of Cincinnati.

4. Harmon Publishing Company advertises its real estate offerings through its free publication, Home Magazine. Approximately fifteen percent (15%) of those magazines are distributed to the public through free-standing, weighted,

plastic dispensing devices situated in twenty-four (24) locations within the City of Cincinnati.

5. Pursuant to Cincinnati Municipal Code, Section 714-23, the City prohibits the distribution on public property of all publications deemed "commercial handbills" by a city official.

6. Section 701-1-C of the Cincinnati Municipal Code defines "commercial handbills" as follows:

Commercial handbill shall mean any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

- (a) which advertises for sale any merchandise, product, commodity or thing; or
- (b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or
- (c) which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

7. Section 911-17 and Section 862-1 of the Cincinnati Municipal Code specifically authorize the distribution of "newspapers" on the public right of way. There are fifteen hundred to two thousand (1500 — 2000) newspaper vending devices currently on the public right of way. Neither plaintiff publishes a newspaper.

8. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting them.

9. On or about February 7, 1989, Discovery Center sub-

mitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's department of Public Works.

10. On or about July 13, 1989, Harmon Publishing Company submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's Department of Public Works.

11. Home Magazine consists primarily of listings and photographs of available residential properties in the greater Cincinnati area but occasionally includes information about market trends or other real estate related matters.

12. The Discovery Magazine primarily contains information intended to directly promote registration in the courses Discovery provides, but it also contains some information about current events, activities and topics which may be of public interest.

13. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Discovery Center that its publication constitutes a "commercial handbill," and ordered Discovery Center to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Discovery Center was informed of its right to an administrative hearing with respect to the City's order.

14. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Harmon Publishing Company that its publication constitutes a "commercial handbill," and ordered Harmon Publishing Company to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Harmon Publishing Company was informed of its right to an administrative hearing with respect to the City's order.

15. An administrative hearing regarding the City's order as to Discovery Center's dispensers occurred on April 5, 1990.

16. An administrative hearing regarding the City's order as to Harmon Publishing's dispensers occurred on April 26, 1990.

17. Plaintiffs' appeals were heard by the Sidewalk Appeals Committee. The individuals who sat on the Sidewalk Appeals Committee were the City Engineer, the Assistant City Solicitor, and the Director of Public Works or his designee. All of these officials participated directly in the original decision to revoke plaintiffs' permits on the grounds that plaintiffs' publications constitute commercial handbills.

18. Plaintiffs' petitions were denied, and they were requested to remove their dispensing devices.

19. The City of Cincinnati had agreed not to interfere with plaintiffs' dispensing devices until a ruling on the merits of this case is made. Those devices are still present in the public right of way.

CONCLUSIONS OF LAW

1. The test for identifying commercial speech is whether the communications "propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

2. Where commercial and noncommercial speech are "inextricably intertwined," the entire communication is classified as noncommercial. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988). Noncommercial aspects of speech are "inextricable" where it is impossible to sell the advertised items without the noncommercial speech or where the noncommercial speech is required to be combined with commercial messages. *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989).

3. The publications distributed by Discovery Center and Harmon Publishing Company constitute forms of commercial speech. Both publications propose commercial transactions in that they are primarily intended as advertisements. Home Magazine, published by Harmon Publishing, advertises real estate available in the greater Cincinnati area. Discovery Center's publication is intended to advertise for-profit programs offered by Discovery Center. Neither publication con-

tains noncommercial speech that is inextricably intertwined with the commercial speech. There is no law requiring the editorials in question to be published together with advertisements for educational or social programs or real estate.

4. Commercial speech is entitled to First Amendment protections if it concerns lawful activity and it is not misleading. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

5. The publications distributed by Discovery Center and Harmon Publishing Company are entitled to First Amendment protections. Both publications concern lawful activity and neither publication is misleading.

6. The City of Cincinnati may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

7. A government restriction on commercial speech is valid if "the regulation directly advances the governmental interest asserted, and . . . it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Co.*, 447 U.S. at 556. This test does not require that the regulation be the least restrictive means available to further the interest. *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989). Rather, it requires a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 3035 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986)). The fit must be "one whose scope is 'in proportion to the interest served.'" *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

8. The burden is on the government to affirmatively establish the reasonable fit required. *Id.*

9. Based upon these standards, we find that the City of Cincinnati has failed to affirmatively establish such reasonable fit. Complete prohibition of commercial handbills on any public right of way is an excessive means by which to accomplish the governmental objectives of safety and

aesthetic appeal. The "fit," in this case, is unreasonable. The number of dispensers dispensing commercial handbills (62) on the public right of way is minute in comparison to the total number of dispensing devices on the street (1500 — 2000), and such dispensers effect public safety and aesthetics in only a minimal way. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting the speech in question. This court has no doubt that the city acted in good faith, here, with the intent only to protect the citizens of Cincinnati. However, freedom of speech is a fundamental constitutional right, and the city acted somewhat overzealously in executing its good intentions. While the City's objectives of promoting safety and aesthetics are substantial, complete prohibition of the devices in question is unreasonable and violative of plaintiffs' fundamental First Amendment rights.

10. A basic requirement of due process is a fair trial before a fair tribunal. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *In re Murchison*, 349 U.S. 133 (1955). This rule is equally applicable to administrative agencies which adjudicate issues. *Withrow v. Larkin*, 421 U.S. 35 (1975). The fact that the same agency or persons combine both investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias. *Larkin*, 421 U.S. at 47. One who makes such a contention has a "much more difficult burden of persuasion to carry." *Id.* The plaintiff must overcome a presumption of honesty and integrity in those individuals serving as administrative adjudicators. *Id.* The fact that those on the adjudicating committee have previously stated that a request should be denied based on its prior *ex parte* investigation does not necessarily mean that the minds of its members were irrevocably closed to the merits of plaintiffs' arguments. *Id.* at 48.

11. Based upon these standards, we find that the mere fact that the same individuals who made the original decision

also sat on the Sidewalk Appeals Committee is not sufficient to deem the practice unconstitutional. The original decision was based on its prior *ex parte* investigation. The final decision was made by the Sidewalk Appeals Committee after hearing arguments by each plaintiff. There is no allegation that the city officials acted dishonestly or in bad faith. The plaintiffs have failed to overcome the presumption of honesty and integrity in those individuals serving as administrative adjudicators.

CONCLUSION

Accordingly, for the reasons set forth above, we find that the regulatory scheme advanced by the City of Cincinnati completely prohibiting the distribution of commercial handbills on the public right of way violates the First Amendment. However, the manner in which the City currently handles appeals of decisions regarding permits that are denied does not violate the Fourteenth Amendment. Judgment shall be entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue.

SO ORDERED.

Dated: 8/21/90

/s/ S. ARTHUR SPIEGEL
United States District Judge

**AMENDMENT I—FREEDOM OF RELIGION, SPEECH
AND PRESS; PEACEFUL ASSEMBLAGE; PETITION
OF GRIEVANCES**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

2
No. 91-1200

Supreme Court, U.S.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's test for evaluating the constitutionality of regulations burdening commercial speech.
2. Whether the enforcement of Petitioner's ordinance prohibiting the distribution of commercial handbills on the public right of way so as to ban Respondents' newsracks violates the first amendment to the United States Constitution.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1200

THE CITY OF CINCINNATI,
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DISCOVERY NETWORK, INC., ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a-17a, is reported at 946 F.2d 464. The opinion of the United States District Court for the Southern District of Ohio, Pet. App. 18a-25a, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1991. The petition for a writ of certiorari was filed on January 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is not disputed.

MUNICIPAL ORDINANCE INVOLVED

Section 714-23 of the Cincinnati Municipal Code, which provides, in pertinent part:

Nor shall any person hand out or distribute or sell any commercial handbill in any public place.

STATEMENT

On June 1, 1990, Respondents Discovery Network, Inc. ("Discovery Center") and Harmon Publishing Company, Inc. ("Harmon"),¹ filed a complaint in the district court pursuant to 42 U.S.C. § 1983, alleging that Petitioner The City of Cincinnati's ("City") regulatory scheme prohibiting the distribution of commercial handbills on the public right-of-way, both facially and as applied to Respondents' newsracks, violated Respondents' first and fourteenth amendment rights of freedom of speech and equal protection of the laws and Respondents' fourteenth amendment right to procedural due process. Respondents sought both declaratory and injunctive relief. Upon the City's agreement not to enforce its regulatory scheme pending a hearing on the merits, the district court consolidated Respondents' motion for preliminary injunction with the hearing on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Following that hearing on July 9, 1990, the district court issued findings of fact and conclusions of law, holding that Respondents' publications are commercial speech and that the City's regulatory scheme violates Respondents' first amendment rights.² The district court found that the "fit" between the City's goals of enhancing safety and the aesthetic appeal of the right of way, on the one hand, and the total ban of Respondents' newsracks, on the other, was "unreasonable."

¹ Respondent Discovery Network, Inc. has no parent company and no nonwholly owned subsidiary. The parent companies of Respondent Harmon Publishing Company, Inc. are:

The Harz Group
The Harmon Group
Hartz Mountain Corporation
Hartz Mountain Industries

Respondent Harmon Publishing Company, Inc., has no nonwholly owned subsidiary.

² The district court ruled in the City's favor on Respondents' due process claim and did not reach Respondents' equal protection claim. Respondents did not cross-appeal either from the district court's judgment on the due process claim or from its determination that their publications are commercial speech.

under this Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). Pet. App. at 23a. The ban was "excessive," the district court found. Pet. App. at 24a. The number of newsracks prohibited was "minute" in comparison with the total number of newsracks remaining on the right of way; therefore, the resulting effect on the City's goals was "minimal." *Id.* The district court entered judgment on August 23, 1990. The City filed a timely Notice of Appeal. On October 30, 1990, the district court stayed execution of its judgment pending appeal. On October 11, 1991, following briefing and oral argument held on April 30, 1991, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the judgment of the district court and entering judgment accordingly. The City filed a timely Petition for a Writ of Certiorari in this Court.

Respondent Discovery Network, Inc. ("Discovery Center") is an Ohio corporation that promotes, for a fee, non-credit life-long learning programs, recreational opportunities and social events for individuals in the greater Cincinnati area. Discovery Center promotes and publicizes its programs by distributing a free magazine that is published nine (9) times per year. In February, 1989, the City issued Discovery Center a permit to distribute its magazine in newspaper vending devices ("newsracks") located on City sidewalks. The permit was issued pursuant to Amended Regulation 38, which, at all times relevant, governed the method of placement of newsracks upon the public right-of-way with respect to vehicular and pedestrian traffic and ramps for the handicapped and regulated the manner in which newsracks advertised the publications they contain.³ Discovery Center pur-

³ On May 31, 1991, following oral argument in this case, the City Manager of the City of Cincinnati approved Administrative Regulation 67, which currently governs "Newsracks in the Public Right-of-Way." Administrative Regulation 67 provides, in pertinent part,

chased fifty (50) newsracks, thirty-eight (38) of which were placed in various locations in downtown Cincinnati, all in locations preapproved by the City. Approximately one-third ($\frac{1}{3}$) of the Discovery Center magazines being distributed in the City of Cincinnati are distributed by means of these newsracks.

Discovery Center's newsracks are free-standing metal dispensing machines approximately three (3) feet high, three (3) feet wide, and eighteen (18) inches deep and comprise a dispensing box set upon either a pedestal or a four-legged stand. At all times relevant, Discovery Center's newsracks were affixed to certain sites such as light poles by means of chains, as were numerous newsracks belonging to local and national newspapers. Discovery Center's newsracks were at all times relevant in compliance with the requirements of Amended Regulation 38.

Respondent Harmon Publishing Company, Inc. ("Harmon") is a New Jersey corporation registered to do business in Ohio that publishes and distributes magazines advertising real estate in locations throughout the United States, including the Cincinnati area. Harmon distributes a free publication, *Homes Magazine*, through free-standing, weighted plastic newsracks placed in twenty-four locations in the Cincinnati area. Approximately fifteen (15) per cent of the magazines Harmon distributes in the Cincinnati area are distributed

Section 2 Downtown — Central Business District

- (2). No more than two (2) newsracks in one location may contain commercial handbills as defined in Section 714-1-C of the Cincinnati Municipal Code unless there are vacant positions. The third and subsequent commercial handbill dispensing devices will be displaced when newspapers are granted permits for those positions.

Although the City is currently enforcing Administrative Regulation 67, it has notified Respondents of its intention to again enforce the ordinance at issue in this case, so as to ban Respondents' newsracks, should it prevail on the merits in this Court.

through its newsracks. On July 21, 1989, the City approved Harmon's request for a newsrack permit pursuant to Amended Regulation 38. As was true of Discovery Center's devices, at all times relevant Harmon's newsracks fully complied with Amended Regulation 38.

On February 7, 1990, the City Council of the City of Cincinnati passed a motion requiring the City's Department of Public Works to enforce the City's existing ordinances governing the distribution of "commercial handbills" on the public right-of-way so as to bar from the right-of-way newsracks from which "commercial handbills" were distributed. The City Manager reported that, pursuant to the relevant ordinances (Cincinnati Municipal Code Sections 714-23 and 714-1-C) and Amended Regulation 38, he would henceforth instruct the Public Works Department to approve newsrack requests only for publications primarily presenting coverage of, and commentary on, current events.⁴

On March 8, 1990, the City sent identical letters to Respondents Discovery Center and Harmon, advising them that their respective publications had been deemed "commercial handbills" under Municipal Code Section 714-1-C and revoking their newsrack permits. Administrative hearings were held regarding the City's order revoking Discovery Center's and Harmon's newsrack permits on April 5, 1990, and April 26, 1990, respectively. Both Discovery Center's and Harmon's appeals were denied, and each was ordered to remove its newsracks from the City right-of-way. The instant litigation then ensued.

At the hearing on the merits before the district court, City Architect Robert Richardson testified that although the City has since 1979 attempted to develop aesthetic standards governing structures upon the City's right-of-way, none has been enacted into law. The City had drafted and was intend-

⁴ The texts of Amended Regulation 38 and Section 714-1-C of the Cincinnati Municipal Code are set forth in the opinion of the court of appeals. Pet. App. at 2a, 3a.

ing to enforce a set of guidelines developed in cooperation with newspaper publishers which would regulate not only the placement of vending devices but also their design, imposing a degree of uniformity in size and appearance which the City Architect found desirable. The City had not included Discovery Center or Harmon in its negotiations concerning these guidelines, which, at the time of the hearing, had been embodied in a proposed administrative regulation dated June 14, 1990.⁵ Respondents' witnesses testified that there was no provision of the proposed regulation with which Discovery Center and Harmon would be unable or unwilling to comply.

The City Architect conceded that there was "nothing wrong with" Discovery Center's and Harmon's newsracks from an aesthetic point of view. TR-20. Furthermore, he was not aware of any safety problems caused by Respondents' newsracks. Indeed, the City Architect testified that were Respondents to use the same newsracks as the newspapers, or any other device deemed appropriate by the City, he would have no aesthetic objection. His concern was that if some publications deemed "commercial handbills" were allowed to have newsracks on the public right-of-way, others would follow and the numbers could become a significant problem. He also testified, however, that the same proliferation concerns would be implicated if additional numbers of publishers of publications not deemed "commercial handbills" sought to place newsracks on the public right-of-way.

According to the City Architect, all newsracks, collectively, posed aesthetic problems due to their lack of uniformity in design. The problem of rusting of City poles caused by the chains used to secure newsracks raised safety and aesthetic concerns implicating all newsracks on the right-of-way. Similarly, the City Architect's concerns with respect to

⁵ The guideline ultimately approved is Administrative Regulation 67, which currently governs newsracks in the public right of way.

aesthetics, location and quantity related to all newsracks, regardless of the type of publication they contained. If the quantity and size of newsracks were regulated in some manner, the City Architect testified, those concerns would be satisfied.

City Engineer Thomas Young, whose office is responsible for issuing newsrack permits, testified that Respondents' permits were the first to be requested by publications that were not newspapers. He knew of no damage or injury claims attributed to Discovery Center's newsracks, and he was aware of only one complaint regarding either of Respondents' newsracks, a complaint from a merchant who objected to the placement of a Discovery Center newsrack near her store (a complaint which Discovery Center had readily addressed and remedied).

The City Engineer testified that the decision to revoke Respondents' newsrack permits was related to the general "problem of the proliferation of the [dispensing] device." TR-64. Respondents' newsracks, the City Engineer stated, were not specifically ordered removed from the City right-of-way because they presented safety or aesthetics problems. It was the general "issue of proliferation of dispensing devices" which was a potential safety issue. The City Engineer acknowledged that if commercial publications such as Respondents' "were considered legal," there was no reason why the City's proposed regulation could not be applied to them. Young Deposition at 52-53. He estimated that at the time of the hearing there were between fifteen hundred (1500) and two thousand (2000) dispensing devices on the City right-of-way. Only four publishers — including Respondents — had applied for newsrack permits from 1989 until the date of trial. Indeed, only four publishers of "commercial" publications had applied for newsrack permits in the five years that Mr. Young had served as City Engineer.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This case is firmly grounded in its particular facts, which pertain to the dissemination of protected commercial speech in newsracks.

The City contends that this Court's plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), should control the outcome of the instant case. Pet. at 13. It is important, therefore, to examine why this Court determined that the ordinance before it in *Metromedia*, which completely prohibited off-site billboards displaying commercial speech, "directly advanced" the City of San Diego's interests in safety and aesthetics, as required by *Central Hudson Gas & Electric Corp., v. Public Service Commission of New York*, 447 U.S. 557 (1980). In *Metromedia*, the California Supreme Court had held that because billboards were designed to distract a driver's attention from the road, and in fact do so distract, an ordinance eliminating those billboards reasonably relates to traffic safety. 453 U.S. at 508-09 (citing 26 Cal. 3d. at 859, 610 P.2d at 412)). This was so even though there was controversy as to whether the distractions of billboards in fact caused traffic accidents. *Id.* Since the legislative judgment was not unreasonable, this Court found that the City of San Diego's safety concerns were directly advanced by the ban. 453 U.S. at 509. This Court also looked to the inherent characteristics of billboards in deciding that the ban directly advanced the City's aesthetics concerns. "It is not speculative," this Court stated, "to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Id.* at 510 (emphasis added). *Metromedia* is securely grounded in its facts, as it expressly deals with the unique problems associated with the noncommunicative aspects of billboards. As this Court put it, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards." *Id.* at 501 (quoting *Kovacs v. Cooper*, 366 U.S. 77, 97 (1949)).

Unlike *Metromedia*, the instant case involves the law of commercial speech as it relates to the dissemination of such speech by means of newsracks. There was no testimony below that newsracks, by their very nature and regardless of their design or location on the public right of way, represent a threat to the City's interests in safety and aesthetics. To the contrary, the City Engineer expressly testified that the City's interest in banning Respondents' newsracks containing "commercial speech" was motivated neither by aesthetic nor safety concerns. TR-64. Indeed, the notion that the presence of newsracks on the public right of way is inherently at odds with the City's efforts to enhance public safety and aesthetics is belied by the City's own evidence. As the City Engineer testified, the City has worked with local newspapers to devise a proposed regulation restricting the number, design and placement of newsracks containing "non-commercial" publications. This testimony evidences the City's willingness to permit thousands of newsracks to remain on the public right of way, provided they satisfy the regulation's requirements. The City presented scant evidence that Respondents' newsracks pose a particular threat to its interests, let alone a threat materially differing from that assertedly posed by newsracks unaffected by the ban. In the absence either of such evidence, or of evidence that newsracks in general are inherently and irremediably unattractive or threatening to public safety, the City's ban of Respondents' newsracks cannot be justified by the reasoning of the plurality of this Court with respect to billboards in *Metromedia*.

2. The court of appeals applied well-settled legal principles in a manner entirely consistent with the relevant decisions of this Court in holding the City's ban unconstitutional.

From the outset of this litigation, the City has been guided by its assumption that Respondents' publications are not protected by the first amendment, even though Respondents' speech is concededly neither false nor misleading. As this Court's jurisprudence governing commercial speech makes clear, the City's assumption is without foundation. Contrary to the City's contention, Pet. at 11-13, the court of appeals decided this case in a manner entirely consonant with the analytical framework set forth by this Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), and recently interpreted by this Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). It is undisputed that the activities promoted by Respondents' publications are lawful and that the speech contained therein is not misleading. Therefore, Respondents' publications are protected by the first amendment. *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986). Respondents concede that the City's interests in aesthetics and safety are "substantial," within the meaning of *Central Hudson*. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). Therefore, under *Central Hudson*, the regulation banning Respondents' newsracks from the public right-of-way is constitutional only if (1) "the regulation directly advances the government interest asserted;" and (2) "[the regulation] is not more extensive than is necessary to serve that interest." 477 U.S. at 564. The court of appeals held that the City's ban does not satisfy the last element of the *Central Hudson* test, because the ban does not embody a "reasonable fit" within the meaning of *Fox*, between the City's goals and the means chosen to effectuate those goals. Pet. App. at 7a, 13a.

The City contends that in so holding the court of appeals embarked upon an unprecedented mode of analysis. Pet. at 13. In fact, the court of appeals was entirely faithful to this Court's interpretation of the *Central Hudson* test in *Fox*, in which this Court eschewed both a least restrictive means test and a rational basis test for determining whether a regulation burdening commercial speech satisfies the *Central Hudson* requirement that the regulation be "no more extensive than is necessary" to serve the asserted government interest. As this Court required in *Fox*, the court of appeals took into account the cost of the ban to Respondents, and measured that cost against the benefits the ban would have for the City's interests in public safety and aesthetics. Pet. App. at 13a. The court of appeals found, as did the district court, that a ban on Respondents' newsracks, which comprised sixty-two out of a total of between fifteen hundred and two thousand newsracks currently on City sidewalks, would have a "minuscule" effect on the City's concerns for safety and aesthetics. *Id.* at 13a. In contrast, the court of appeals correctly recognized that if the ban were held constitutional, the cost to Respondents and to the public would be a heavy one: the total loss of the means of distributing thirty-three percent of Discovery Center's publications and fifteen percent of Harmon's publications in the Cincinnati area. *Id.* In determining that the fit between the ban and the City's aesthetics and safety-related goals was unreasonable, under *Fox*, the court of appeals recognized that "commercial speech has public and private benefits apart from [those to be derived from not imposing an undue burden on Respondents' particular commercial speech]." *Id.* That assertion is not without precedent in this Court. Recognition of the inherent value of commercial information that is neither false nor misleading has been implicit in this Court's commercial speech jurisprudence. See *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

The City suggests that the court of appeals applied a "least restrictive means" analysis in spite of this Court's rejection of

such a test in *Fox*. Pet. at 12. In fact, the court of appeals has not required Petitioner to follow one and only one regulatory option in order to advance its traffic safety and aesthetics goals. Pet. App. at 14a. The court of appeals' decision reflects its conclusion that Petitioner's ban is "substantially excessive," *Fox*, 492 U.S. at 479, when measured against the more precise means of accomplishing the City's goals that were readily available to the City, and when measured against the inordinate burden an absolute ban imposes upon Respondents' protected commercial speech. Moreover, in weighing the regulatory alternatives available to the City, the court of appeals was not engaging in speculation. The City Engineer testified that the City was attempting to regulate the design, placement and number of newsracks, and that it had developed a proposed regulation in consultation with local newspapers (but without inviting Respondents' participation). As the City's counsel indicated (during oral argument) would eventually be the case, Petitioner has since approved and is currently enforcing an administrative regulation which allows newsracks containing commercial speech on the public right of way and subjects all newsracks to design and numerical limitations, prescribing the manner in which newsracks must be affixed to the right of way and aligned with respect to one another. There is no principled reason why the regulatory criteria the City has devised can not be applied to all newsracks, without reference to the content of the publications they contain. Indeed the City Engineer acknowledged as much when he stated that such regulations could be applied to newsracks containing commercial publications "if [such publications] were considered legal." Young Deposition at 52-53. This is precisely what the court of appeals has required the City to do.

3. The enforcement of the City's ordinance so as to ban Respondents' newsracks fails to directly advance the City's interests in public safety and aesthetics.

The court of appeals' judgment that the ban is an unconstitutional burden upon commercial speech is not only correct under *Fox*. It is also correct because, as the district court's findings indicate, the ban fails to satisfy this Court's requirement in *Central Hudson* that it "directly advance" the City's interests in safety and aesthetics. In *Central Hudson*, this Court explained that "[a] regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. As noted above, the City's witnesses asserted that *all* newsracks on the public right of way negatively affect aesthetics and public safety. Yet the City is content to permit the overwhelming majority of newsracks to remain on the right of way, regardless of their total number or their "proliferation," provided those newsracks contain newspapers. The district court found that the number of newsracks affected by the ban is "minute" when compared with the total number of newsracks remaining on the public right of way. Pet. App. at 24a. Therefore, the district court found, the ban's effect on the City's goals was "minimal." *Id.* On review, the court of appeals found that since the ban affects only sixty-two of the between fifteen hundred and two thousand newsracks on the public right of way, the resulting benefit for the City was "minuscule," and could not justify the ban under the cost/benefit analysis required by *Fox*. Pet. App. at 13a. The court of appeals' and the district court's assessments of the impact a ban of Respondents' newracks would have on the City's asserted interests support the conclusion that the ban does not "directly advance" those interests within the meaning of *Central Hudson*. Cf. *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 811-12 (1984) (in absence of finding that content-neutral ban on posting of temporary signs on public property would have "an inconsequential effect" on City's asserted aesthetic interests, there was no predicate for district court's finding

that ban failed to advance those interests). Therefore, the ban fails to pass constitutional muster even without reference to the *Fox* cost/benefit analysis.

4. This case does not create a direct conflict among decisions of the Courts of Appeals with respect to the dissemination of commercial speech in newsracks.

Contrary to the City's contention, Pet. at 8-9, there is no direct conflict between the court of appeals' decision in this case and the decision of the United States Court of Appeals for the Eleventh Circuit in *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988). In *Don's Porta Signs*, the court reversed the judgment of the district court holding unconstitutional a municipal regulation effectively banning the use of portable signs for commercial advertising. 829 F.2d at 1054. In so holding, the Eleventh Circuit considered itself bound by its earlier application of the *Central Hudson* test to uphold a content-neutral municipal ban on portable, temporary signs in *Harnish v. Manatee County, Florida*, 783 F.2d 1535 (11th Cir. 1986). 829 F.2d at 1053-54. The *Harnish* Court interpreted this Court's decisions in *Central Hudson*, *Metromedia* and their progeny to require a deferential standard in assessing whether a regulation burdening commercial speech satisfies the third and fourth prongs of the *Central Hudson* test. 783 F.2d at 1539. The *Harnish* Court understood this Court's decisions to mean, *inter alia*, that a municipality "must be given discretion in determining how much protection [of its aesthetic interests] is necessary and the best method of achieving that protection." *Id.*

Following that principle, the Eleventh Circuit upheld the city's ban on commercial advertising by means of portable signs without weighing the ban's benefits for the city against its cost to commercial advertisers. 829 F.2d at 1954. *Harnish* and *Don's Porta Signs* were decided without the benefit of this Court's clarification of the *Central Hudson* means/ends

analysis in *Fox*. After *Fox*, it is not enough that a reviewing court determine that a municipality has "a sufficient basis," *Don's Porta Signs*, 829 F.2d 1054 (quoting *Metromedia*, 453 U.S. at 508 (plurality)) for enacting a total ban on a particular mode of commercial speech, in order to uphold such a ban. The inherent value of commercial speech, and the cost to commercial speech resulting from the burden a municipality places upon it, must form part of a court's calculus in determining whether the burden is consistent with the first amendment. *Fox*, 492 U.S. at 480. In the instant case, the court of appeals applied the *Fox* analysis, and is, therefore, not in conflict with *Don's Porta Signs*, which gives essentially no weight to commercial speech interests.⁶

There is likewise no conflict between the court of appeals' decision in the instant case and the decision in *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991), the City's contention to the contrary notwithstanding. Pet. at 7-8. In *Chicago Observer*, the United States Court of Appeals for the Seventh Circuit upheld an ordinance that prohibited "off-premises" advertisements (defined as advertisements for businesses located more than twenty feet from the advertisement) on the public right of way, limited the size of newsracks, and prohibited the attachment of "off-premises" advertisements to newsracks. 929 F.2d at 327. As

⁶ *Don's Porta Signs* is also distinguishable from the court of appeals' decision in the instant case because it is expressly limited to "the aesthetics problems caused by portable signs." 829 F.2d at 1054. In contrast, the City of Cincinnati disavowed the notion that its ban on newsracks carrying Respondents' publications (or like publications) was founded on aesthetic concerns. In addition, in *Don's Porta Signs*, the district court failed to address the impact on Clearwater's aesthetic of a ban prohibiting only portable signs carrying commercial speech. Presumably, since the *Don's Porta Signs* Court analyzed the effect of the ban in terms of the relative unattractiveness of other features of the urban landscape including permanent signs and buildings, 829 F.2d at 1053, the ban at issue in that case eliminated all portable signs regardless of the content of the message they carried. In the instant case, of course, the district court found that the number of newsracks eliminated by the City's ordinance was "minute."

an initial matter, it is unclear whether the first amendment rights of those engaging in commercial speech were directly at issue in *Chicago Observer*, in which a newspaper challenged restrictions upon the manner in which it distributed its publication. The *Chicago Observer* Court did not address the *Central Hudson* test, let alone engage in the cost/benefit analysis required by this Court in *Fox*. Instead, the *Chicago Observer* Court analyzed the ordinance before it by means of the framework enunciated by this Court in *City Council v. Taxpayers for Vincent*, 929 F.2d at 328 (citing *Vincent*, 466 U.S. 789, 805-07 (1984)). The ordinance did not affect publications differentially because of their content. *Id.* It merely eliminated certain types of advertising and certain types of newsracks. *Id.* at 328-29. Since the ordinance was content-neutral and did not cut off alternative means of communication, the *Chicago Observer* court held that it satisfied the *Vincent* test. *Id.* at 329.

In stark contrast to the facts of *Chicago Observer*, the instant case involves an attack upon Respondents' newsracks that is manifestly based upon the content of the publications they contain. In *Chicago Observer*, the ordinance's objective was a type of newsrack that the municipality deemed particularly offensive to its interests. The "visual clutter" the City of Chicago was attempting to regulate was the *Chicago Observer's* particular newsrack itself, which the Seventh Circuit referred to at one point as a "billboard." 929 F.2d at 327. The decision in *Chicago Observer* simply requires the *Observer* to obtain a different newsrack in order to remain on the right of way. In the instant case, the "visual clutter" the City is attempting to address is ostensibly newsracks, *in general*. The effect of enforcement of the ordinance, however, is to completely ban Respondents' publications, and *only* Respondents' publications, from the right of way, despite the fact that the City is purporting to address the "visual clutter" caused by newsracks. In clear contradiction of the City's position, Pet. at 8, the distinction between this case, in which the commercial speech subject to the ban is

within Respondents' newsracks, and *Chicago Observer*, in which the commercial speech was on the Observer's newsracks, is a critical distinction. Respondents' publications are not the source of visual clutter in the instant case. The ban, therefore, does not "respond . . . precisely to the substantive problem," *Vincent*, 466 U.S. at 810, that the City is attempting to address. The City's witnesses testified that there is nothing inherent in Respondents' newsracks which distinguishes them, in terms of a putative affect upon aesthetics or safety, from the newsracks of the other publications the City is content to allow to remain on the public right of way. Contrary to the City's assertion, the court of appeals' decision in this case does not "seriously impair Cincinnati's ability to curtail visual clutter for aesthetic and safety reasons." Pet. at 8. It is consistent with *Chicago Observer* in encouraging the use of limits upon the manner in which publications are distributed in the public right of way, "so long as [the regulations chosen] do not treat newsracks differently according to the content of the publications inside." Pet. App. at 14a. Like other forms of protected speech, commercial speech that is neither false nor misleading is subject to reasonable time, place and manner restrictions. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). There simply is no conflict between the court of appeals' decision in the instant case and the Seventh circuit's decision in *Chicago Observer*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARC D. MEZIBOV

Counsel of Record

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Attorneys for Respondents

APR 23 1992

OFFICE OF THE CLERK

No. 91-1200

In The
Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1-205

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Petition For Certiorari Filed January 8, 1992
Certiorari Granted March 9, 1992

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RELEVANT DOCKET ENTRIES

Discovery Network, et al., v. City of Cincinnati
No. C1-90-437

United States District Court, Southern District of Ohio
Western Division

6-1-90	Complaint, summons issued
6-4-90	Motion by Discovery Network, et al for temporary restraining order and preliminary injunction
6-4-90	Certificate by plaintiffs counsel
6-6-90	Order: Upon agreement with counsel defendant will not enforce Municipal code etc.
6-22-90	Answer
7-9-90	CIVIL MINUTES: Proceeding before Judge Spiegel that the motion for preliminary injunction is submitted on the merits
7-24-90	Transcript of proceedings (Preliminary injunction hearing on 7-9-90)
8-23-90	Findings of Fact and Conclusions of Law Judgment shall be entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue
8-23-90	Judgment entry
9-6-90	Motion by defendant City of Cincinnati for stay of execution of judgment pending appeal
9-10-90	Notice of Appeal by defendant City of Cincinnati
9-12-90	Record certified to United States Court of Appeals for the Sixth Circuit

10-19-90 Transcript of proceedings
 10-30-90 Order Staying execution of judgment pending appeal

Discovery Network, et al., v. City of Cincinnati
 No. 90-3817

United States Court of Appeals for the Sixth Circuit

9-20-20 Civil case docketed. Notice filed by Appellant
 City of Cincinnati

10-11-91 Opinion filed: Affirmed

10-11-91 Judgment: Affirmed

1-13-92 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant
 City of Cincinnati

3-16-92 U.S. Supreme Court order filed granting petition for writ of certiorari filed in the Supreme Court on 3-9-92

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF OHIO
 WESTERN DIVISION

DISCOVERY NETWORK, INC.,	:	Case No.
d.b.a. Discovery Center,	:	C-1-90-437
an Ohio Corporation,	:	
1700 Madison Road	:	SPIEGEL, J.
Cincinnati, Ohio 45206	:	
And	:	<u>COMPLAINT</u>
HARMON PUBLISHING CO., INC.,	:	(Filed
a New Jersey Corporation,	:	Jun 1, 1990)
401 Market Avenue	:	
Canton, Ohio 44702	:	
Plaintiffs,	:	
-VS-	:	
THE CITY OF CINCINNATI,	:	
c/o Scott Johnson, City Manager,	:	
City Hall	:	
801 Plum Street	:	
Cincinnati, Ohio 45202	:	
Defendant.	:	

Now come Plaintiffs, Discovery Network, Inc., d.b.a. Discovery Center, and Harmon Publishing Co., Inc., which for their cause of action against the City of Cincinnati, Ohio, state as follows:

PRELIMINARY STATEMENT

1. This is a civil rights action brought by Discovery Network, Inc., an Ohio corporation doing business and

hereinafter referred to as "Discovery Center", and Harmon Publishing Co., Inc., a New Jersey corporation registered to do business in the State of Ohio, hereinafter referred to as "Harmon", to permanently enjoin enforcement of directives from the City of Cincinnati, Ohio, requiring Discovery Center and Harmon to remove newspaper dispensing devices from city property and to declare as unconstitutional the city's regulatory scheme upon which the directives are based.

JURISDICTION

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §2201 and §2202, and by 42 U.S.C. §1983 and §1988. This is a suit authorized by law to redress deprivations under color of state law of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution.

3. Venue in this Court is appropriate as the various acts, ordinances, regulations and directives from which Plaintiffs seek relief occurred or are being enforced within the Western Division of the Southern District of Ohio.

PARTIES

4. Plaintiff, Discovery Center is an Ohio corporation which promotes and, for a fee, provides non-credit life long learning programs, recreational opportunities and social events for individuals within the Greater Cincinnati, Ohio area.

5. Plaintiff Harmon is a New Jersey corporation, registered and doing business as a foreign corporation in Ohio, which publishes and distributes magazines advertising real estate in various locations throughout the United States, including the greater Cincinnati area.

6. Defendant, the City of Cincinnati, is a municipal government and political subdivision in the State of Ohio and as such constitutes a "person" for purposes of 42 U.S.C. §1983.

STATEMENT OF THE CASE

7. Discovery Center promotes and publicizes the nature and availability of its programs by means of a free magazine published nine (9) times per year. Currently, a substantial number of these magazines are distributed to the public through free-standing, metal newspaper dispensing machines approximately three (3') feet high, three (3') feet wide, and eighteen (18") inches deep. These newspaper dispensing devices are situated in thirty-eight (38) selected locations within the City of Cincinnati.

8. Harmon distributes its free publication, Home Magazine, through free-standing newspaper dispensing devices which are made of plastic and weighted with a forty (40 lb.) pound ballast in the base. These devices are situated in twenty-four (24) selected locations within the City of Cincinnati.

9. In order to place their respective newspaper vending devices on city property, Discovery Center and Harmon were each required to and, in fact, did submit to the Department of Public Works of the City of Cincinnati a

Request to Place Newspaper Vending Devices in Public Right-of-Way, pursuant to Regulation 38, which pursuant to Cincinnati Municipal Code, Section 911-17, details the city's regulatory scheme with respect to newspaper vending devices. See Exhibit "A" attached hereto.

10. Both Discovery Center and Harmon complied fully with the city's application process and with all conditions precedent to approval of their respective requests for permission to place newspaper vending devices in public right-of-way at specifically designated locations.

11. The City expressly approved the application of Discovery Center on or about February, 1989, and the application of Harmon on or about July 13, 1989. In conjunction with their initial grants of permission, Discovery Center and Harmon were each advised by city officials that their authority to maintain the newspaper vending devices at approved locations was contingent solely upon continued compliance with Regulation 38. Discovery Center and Harmon have continually been and remain in strict compliance with the terms, conditions and requirements of Regulation 38.

12. Notwithstanding its express grant of approval and Plaintiffs' consequent and foreseeable good faith reliance thereon, which has included the purchase, placement and maintenance of newspaper vending devices, the City issued directives to each of the Plaintiffs revoking the City's permission and requiring Plaintiffs to remove the newspaper vending devices from the city right-of-way on the ground that the publications distributed by Plaintiffs by means of newspaper vending

devices violate the City's proscription against the distribution of commercial handbills in any public place pursuant to Cincinnati Municipal Code, Section 714-23. See Exhibits "B" and "C" attached hereto.

13. Section 714-1-C of the Cincinnati Municipal Code defines a commercial handbill, in pertinent part, as any printed matter:

(a) which advertises for sale any merchandise, product, commodity or thing; or

(b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting an interest thereof by sales; or

(c) which directs attention to or advertises any movie, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

14. Plaintiffs have been informed by representatives of the City that the ostensible reason why the City has revoked their permits is to serve the City's interest in promoting and enhancing public safety and aesthetics.

15. Upon information and belief, the City intends to allow certain other publishers to maintain newspaper dispensing devices in more than approximately eight hundred (800) locations on the city right-of-way notwithstanding the fact that these devices are similar, if not identical, in terms of purpose, size, shape and appearance to those owned, utilized and maintained by Plaintiffs.

16. In addition, the various publications distributed by these other publishers by means of newspaper dispensing devices all advertise for sale merchandise, products, commodities or things, or direct attention to businesses, mercantile or commercial establishments or direct attention to or advertise theatrical exhibits, events and performances for which an admission fee is charged for private gain or profit.

17. The publications distributed by Plaintiffs through their newspaper vending devices are constitutionally protected forms of expression since they contain information about lawful activities and contain absolutely no fraudulent or misleading information.

18. The regulatory scheme of the City set forth in Cincinnati Municipal Code, Sections 714-1-C, 714-1-N and Regulation 38, upon which the City issued its directives to Plaintiffs, is unconstitutional on its face because:

a. It vests the licensing authority of the City, the Department of Public Works, with unbridled discretion as to which publishers receive a permit to place newspaper dispensing devices on city right-of-way and fails to set forth meaningful criteria, standards and guidelines to distinguish between non-commercial speech which, according to the City's scheme, may be distributed on the city right-of-way, and commercial speech which, pursuant to the City's proscription, may not be;

b. It permits one publisher to utilize newspaper vending machines on the public right-of-way while it denies the same opportunity to other publishers based solely on the content of the materials distributed;

c. It effects a total ban on what the City, in its unbridled discretion, deems commercial speech without advancing a legitimate government interest by means of the most narrowly drawn regulation.

19. Further, as applied to Plaintiffs, the regulatory scheme and directives of the City violate Plaintiffs' rights to free speech and equal protection of the laws under the First and Fourteenth Amendments of the United States Constitution.

20. Finally, the City's directive, under color of state law, requires Plaintiffs to immediately remove their newspaper dispensing devices from the city right-of-way depriving Plaintiffs of rights, privileges and property without procedural due process in that the City's regulatory scheme and "ad hoc" appeal process fail to provide adequate notice of what activities are proscribed and contain no objective or meaningful guidelines to be applied by a neutral hearing officer with respect to the decision to revoke the City's permission to place and maintain newspaper dispensing devices on public property.

21. The inability of Plaintiffs to distribute their respective publications by means of newspaper vending devices will subject Plaintiffs to immediate and irreparable injury since there exists no available, comparable or adequate alternative means of distribution of their publications.

22. Unless operation of the City's regulatory scheme and directives to Plaintiffs are temporarily, preliminarily and permanently enjoined by this Court, Plaintiffs will suffer and will continue to suffer irreparable harm to their rights of free speech and equal protection of the laws for which no adequate remedy exists at law.

PRAYER FOR RELIEF

WHEREFORE, Discovery Center and Harmon each demand judgment:

1. Declaring that the administrative scheme by which the City regulates the use of newspaper vending devices in the city right-of-way is unconstitutional on its face and as applied to these Plaintiffs and, hence, is illegal and unenforceable;

2. Entering a preliminary and permanent injunction restraining, prohibiting and enjoining the City of Cincinnati, its agents and employees and all persons in active concert and participation with the City from enforcing, applying and implementing the ordinances, regulations and directive of the City which prohibit the distribution of publications through newspaper vending devices on the city right-of-way;

3. Awarding Plaintiffs their costs of this action and their reasonable attorneys fees pursuant to 42 U.S.C. §1988; and

4. Granting Plaintiffs such other and further relief as may be proper in the premises.

SIRKIN, PINALES, MEZIBOV
& SCHWARTZ

/s/ Marc D. Mezibov
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Telephone (513) 721-4876

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DISCOVERY NETWORK, INC., : Case No.
d.b.a. Discovery Center, :
an Ohio Corporation, :
1700 Madison Road :
Cincinnati, Ohio 45206 :

And :

HARMON PUBLISHING CO., INC., :
a New Jersey Corporation, :
401 Market Avenue :
Canton, Ohio 44702 :

Plaintiffs, :

-VS- :

THE CITY OF CINCINNATI, :
C/O Scott Johnson, City Manager, :
City Hall :
801 Plum Street :
Cincinnati, Ohio 45202 :

Defendant. :

VERIFICATION

STATE OF OHIO)
) SS.
COUNTY OF HAMILTON)

Margaret M. Moertl, being duly sworn, deposes and states that she resides in Cincinnati, Ohio; that she is the

Director of Discovery Network, Inc.; and that she has read the foregoing Complaint and knows the contents thereof; that the same, with respect to each averment concerning Discovery Network, Inc., is true to the best of her knowledge except as to those matters stated to be alleged on information and belief; and that as to those matters she believes them to be true.

/s/ Margaret M. Moertl
MARGARET M. MOERTL

Sworn to and subscribed in my presence this 1 day of June, 1990.

Notorized Seal

/s/ Marc D. Mezibor
Notary Public - State of Ohio

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DISCOVERY NETWORK, INC., : Case No.
d.b.a. Discovery Center, :
an Ohio Corporation, :
1700 Madison Road :
Cincinnati, Ohio 45206 :
And :

HARMON PUBLISHING CO., INC., :
a New Jersey Corporation, :
401 Market Avenue :
Canton, Ohio 44702 :

Plaintiffs, :

-VS- :

THE CITY OF CINCINNATI, :
C/O Scott Johnson, City Manager, :
City Hall :
801 Plum Street :
Cincinnati, Ohio 45202 :

Defendant. :

VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Louis J. Maggiotto, Jr., being duly sworn, deposes and states that he resides in New York City, New York; that he is Vice President and General Counsel of Harmon Publishing Co., Inc.; and that he has read the foregoing Complaint and knows the contents thereof; that the same, with respect to each averment concerning Harmon Publishing Co., Inc., is true to the best of his knowledge,

except as to those matters stated to be alleged on information and belief; and that as to those matters he believes them to be true.

/s/ Louis J. Maggiotto, Jr.
LOUIS J. MAGGIOTTO, JR.

Sworn to and subscribed in my presence this 31 day of May, 1990.

/s/ Gloria Sofia
Notary Public - State of New York
GLORIA SOFIA
NOTARY PUBLIC, State of New York
No. 31-4860668
Qualified in New York County
Term Expires June 2, 1990

EXHIBIT "A"

AMENDED REGULATION NO. 38

In accordance with Section 911-17 of the Cincinnati Municipal Code, the following rules and regulations are promulgated in regard to the dispensing of newspapers of general circulation from devices located within the Public Right-of-Way.

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. The site plan must show all existing street furniture including other newspaper dispensing devices. The site plan shall be of such scale and detail

to allow the reasonable determination of pedestrian obstruction, aesthetics, driver sight distance and any other factor influencing the public safety. The method of attachment of each newspaper device to the sidewalk, post or other fixed object shall be depicted on the site plan. Where attachment is impracticable, an explanation of same is required. The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the device. Approval or denial must be determined within five business days. A request to place newspaper vending device in the public right-of-way and site plan shall be in the form attached hereto as Exhibit A. The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection. Such objection shall be heard by the City Manager or his designee.

A site plan is not required for devices in place as of the date of this Amended Regulation.

2. All persons, partnerships or corporations operating newspaper vending devices must provide the City Manager or his designee with a location inventory of such devices located within the public right-of-way. The location inventory must be updated yearly in July. Such inventory need not consist of a listing of locations, depiction on a street plat is acceptable. The initial inventory shall not be required until October 1, 1984. All devices must meet the site plan criteria as out-lined in item #1 above.
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic

and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems.

4. Each newspaper vending device shall be maintained and kept in good repair at all times. The owner/operator of newspaper dispensing devices within the public right-of-way shall have on file with the City Manager or his designee proof of current comprehensive liability insurance covering the newspaper dispensing devices they own. Compliance with this provision shall occur on or before July 17, 1984.
5. No advertising media shall appear on newspaper dispensing devices located within the public right-of-way except for the name and price of the publication, and promotion of the publication itself or written articles contained therein.
6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person, a representative who can be reached during usual business hours, with the City Manager or his designee. This contact person shall be able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.
7. If, upon written notification or such other method of notification consistent with an emergency or critical situation, the owner/operator of a newspaper dispensing device fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the offending dispensing device, shall be removed from the right-of-way and the owner/operator shall be billed for the cost of the removal and storage of the device. In all non-emergency situations, the owner/operator shall have five

business days to request an opportunity to object to the order to remedy violations. The objection of the owner/operator shall be heard within five business days of the request. Such objection shall be heard by the City Manager or his designee.

Approved:

/s/ Sylvester Murray
Sylvester Murray

Dated: June 1, 1984

EXHIBIT "B"

City of Cincinnati

[SEAL]

Department of Public Works

Room 450, City Hall
801 Plum Street
Cincinnati, Ohio 45202
George Rowe, P.E.
Director of Public Works

April 6, 1990

Margaret M. Moertle
Discovery Center
1700 Madison Road
Cincinnati, Ohio 45206

Dear Ms. Moertle:

On April 5, 1990 the City of Cincinnati heard your appeal concerning the revocation of Discovery Network's permit to distribute its publication in the right-of-way. Pursuant

to Section 714-23 of the Cincinnati Municipal Code Discovery Center has been found to be a commercial handbill. You hereby are notified that you have thirty days from the date of this letter to remove the Discovery Center racks from the public right-of-way.

Very truly yours,
/s/ T E Young
for George Rowe
Director of Public Works

EXHIBIT "C"

City of Cincinnati

[SEAL]

Department of Public Works	Room 450, City Hall 801 Plum Street Cincinnati, Ohio 45202 George Rowe, P.E. <i>Director of Public Works</i>
----------------------------	--

May 1, 1990

Louis J. Maggiotto Jr.
Harmon Publishing
667 Madison Avenue
New York, New York 10021

Dear Mr. Maggiotto:

On April 26, 1990 the City of Cincinnati heard your appeal concerning the revocation of Harmon Publishing's permit to distribute its publication in the right-of-way. Pursuant to Section 714-23 of the Cincinnati Municipal

Code 'Homes Magazine' has been found to be a commercial handbill. You hereby are notified that you have thirty days from the date of this letter to remove the Harmon Publishing racks from the public right-of-way.

Very truly yours,
/s/ George Rowe
George Rowe
Director of Public Works

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DISCOVERY NETWORK,	:	CASE NO.
INC., et. al.,	:	C-1-90-437
PLAINTIFFS,	:	<u>JUDGE SPIEGEL</u>
-VS-	:	ANSWER OF
THE CITY OF	:	DEFENDANT
CINCINNATI	:	CITY OF
DEFENDANT	:	CINCINNATI

Now comes defendant City of Cincinnati, by and through counsel, and for its answer to plaintiffs' complaint hereby states as follows:

1. Defendant denies all allegations contained in paragraphs 1 and 2 of plaintiffs' complaint.

2. Defendant admits that venue is proper as alleged in paragraph 3 of plaintiffs' complaint.

3. Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of plaintiffs' complaint, therefore all of those allegations are hereby denied.

4. Defendant admits the allegations contained in paragraph 6 of plaintiffs' complaint.

5. Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 7 and 8 of plaintiffs' complaint, therefore those allegations are hereby denied.

Furthermore, defendant specifically denies that any dispensing device utilized by plaintiffs constitutes a "newspaper dispensing device" as alleged.

6. Defendant admits that a request was filed, but denies all other allegations contained in paragraphs 9 and 10 and further states that plaintiffs do not distribute "newspapers of general circulation".

7. Defendant admits that one of its employees did approve plaintiffs' application, but denies all other allegations contained in paragraph 11 of plaintiffs' complaint.

8. Defendant admits that it has directed plaintiffs to remove their commercial handbill dispensers from the public right of ways pursuant to section 714.23 of the Cincinnati Municipal Code, and further specifically denies all remaining allegations contained in paragraph 12 of plaintiffs' complaint.

9. Defendant admits that Section 714-1-C of the Cincinnati Municipal Code defines commercial handbills as alleged in paragraph 13 of plaintiffs' complaint.

10. Defendant admits that the reason plaintiffs must remove their commercial handbill dispensers is the defendant's interest in promoting and enhancing public safety and aesthetics as alleged in paragraph 14 of plaintiffs' complaint.

11. Defendant admits that it will allow newspapers of general circulation to distribute newspapers in news-racks, but denies all other allegations contained in paragraph 15 of plaintiffs' complaint.

12. Defendant admits that it will allow distribution of newspapers of general circulation in public right of ways and further admits that some newspapers of general circulation may contain some of the elements listed in paragraph 16 of plaintiffs' complaint, however defendant denies all additional allegations contained in paragraph 16 of plaintiffs' complaint.

13. Defendant denies all allegations contained in paragraphs 17 through 22 of plaintiffs' complaint.

14. Defendant hereby specifically denies all allegations contained in plaintiffs' complaint not herein specifically admitted to be true.

Second Defense

15. Plaintiffs' complaint fails to state a claim upon which relief may be granted.

Third Defense

16. Failure to join necessary and indispensable parties.

Fourth Defense

17. Section 714.23 of the Cincinnati Municipal Code constitutes a reasonable time, place and manner restriction.

Fifth Defense

18. The provision of the Cincinnati Municipal Code dealing with commercial handbills, when considered in connection with provisions of the Cincinnati Municipal Code dealing with newspapers of general circulation, does not grant government officials "unbridled discretion" to determine what speech is prohibited.

Sixth Defense

19. The provisions of the Cincinnati Municipal Code Section 714.23 restricts only one means of distributing [sic] commercial speech and seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective.

Seventh Defense

20. Defendant acted in good faith and with a reasonable belief that its actions were in accordance with the law.

Eighth Defense

21. Plaintiffs lack standing to challenge the facial validity of defendant's ordinance.

Ninth Defense

22. Defendant did not cause, acquiesce or ratify any constitutional violation.

Wherefore, defendant prays that plaintiffs' complaint be dismissed, prays for costs and all other relief that the court determines it is entitled.

Respectfully submitted,

/s/ Richard A. Castellini
RICHARD A. CASTELLINI
 (0017613)
 City of Cincinnati
 Solicitor

/s/ Mark S. Yurick
MARK S. YURICK
 (0039176)
 Assistant City Solicitor
 Attorney for Defendants
 Appellants
 Room 214 City Hall
 801 Plum Street
 Cincinnati, Ohio 45202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Defendant has been sent to Marc Mezibov, Esq., at Sirkin, Pinales, Mezibov and Schwartz, 105 West Fourth Street, Cincinnati, Ohio 45202, by ordinary U.S. Mail on this 21st day of June 1990.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

DISCOVERY NETWORK,	:	No. C-1-90-437
INC., et al.,	:	
	:	FINDINGS OF
Plaintiffs,	:	FACT AND
	:	CONCLUSIONS
vs.	:	OF LAW
CITY OF CINCINNATI,	:	(Filed 90 AUG 23)
	:	
Defendants.	:	

This matter came before the court for an evidentiary hearing on July 9, 1990. This is a civil action brought pursuant to 42 U.S.C. § 1983. The plaintiffs allege that defendant City of Cincinnati's statutory scheme prohibiting the distribution of commercial handbills in the public right of way violates plaintiffs' First Amendment right to freedom of speech and Fourteenth Amendment right to procedural due process. The plaintiffs seek declaratory and injunctive relief. The contested issues of law and fact relate to whether plaintiffs' publications are commercial speech, whether defendant's regulatory scheme violated plaintiffs' First Amendment rights, and whether defendant failed to provide a meaningful opportunity for plaintiffs to gain rescission of defendant's directives. We find that plaintiffs' publications constitute commercial speech, that defendant's statutory scheme violates plaintiffs' First Amendment rights, and that defendant did not fail to provide a meaningful opportunity for plaintiffs to appeal the defendant's directives.

In rendering our decision on this matter, we have considered the testimony of the witnesses, the documents

admitted into evidence, plaintiffs' trial brief (doc. 9), defendant's trial brief (doc. 6), the proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 8) and the defendant (doc. 7), and the supplemental proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 14) and the defendant (doc. 13). In weighing the testimony of the witnesses, we considered each witness' relationship to the plaintiff or the defendant; their interest, if any, in the outcome of the trial; their manner of testifying; their opportunity to observe or acquire knowledge concerning the facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence.

Pursuant to Fed. R. Civ. P. 52, we set forth our findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The plaintiff, Discovery Center, is an Ohio corporation that, for a fee, provides non-credit educational, recreational and social programs to interested individuals in the greater Cincinnati, Ohio area.

2. The plaintiff, Harmon Publishing Company, is a New Jersey corporation registered and doing business as a foreign corporation in Ohio which publishes and distributes magazines advertising real estate in various locations throughout the United States, including the greater Cincinnati, Ohio area.

3. Discovery Center promotes and publicizes the nature and availability of its programs by means of a free

magazine published nine (9) times per year. Approximately one-third (1/3) of these magazines are distributed to the public through free-standing, metal dispensing devices situated in thirty-eight (38) locations within the City of Cincinnati.

4. Harmon Publishing Company advertises its real estate offerings through its free publication, Home Magazine. Approximately fifteen percent (15%) of those magazines are distributed to the public through free-standing, weighted, plastic dispensing devices situated in twenty-four (24) locations within the City of Cincinnati.

5. Pursuant to Cincinnati Municipal Code, Section 714-23, the City prohibits the distribution on public property of all publications deemed "commercial handbills" by a city official.

6. Section 701-1-C of the Cincinnati Municipal Code defines "commercial handbills" as follows:

Commercial handbill shall mean any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

(a) which advertises for sale any merchandise, product, commodity or thing; or

(b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or

(c) which directs attention to or advertises any meeting, theatrical performance, exhibition or

event of any kind for which an admission fee is charged for the purpose of private gain or profit.

7. Section 911-17 and Section 862-1 of the Cincinnati Municipal Code specifically authorize the distribution of "newspapers" on the public right of way. There are fifteen hundred to two thousand (1500 - 2000) newspaper vending devices currently on the public right of way. Neither plaintiff publishes a newspaper.

8. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting them.

9. On or about February 7, 1989, Discovery Center submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's department of Public Works.

10. On or about July 13, 1989, Harmon Publishing Company submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's Department of Public Works.

11. Home Magazine consists primarily of listings and photographs of available residential properties in the greater Cincinnati area but occasionally includes information about market trends or other real estate related matters.

12. The Discovery Magazine primarily contains information intended to directly promote registration in the courses Discovery provides, but it also contains some information about current events, activities and topics which may be of public interest.

13. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Discovery Center that its publication constitutes a "commercial handbill," and ordered Discovery Center to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Discovery Center was informed of its right to an administrative hearing with respect to the City's order.

14. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Harmon Publishing Company that its publication constitutes a "commercial handbill," and ordered Harmon Publishing Company to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Harmon Publishing Company was informed of its right to an administrative hearing with respect to the City's order.

15. An administrative hearing regarding the City's order as to Discovery Center's dispensers occurred on April 5, 1990.

16. An administrative hearing regarding the City's order as to Harmon Publishing's dispensers occurred on April 26, 1990.

17. Plaintiffs' appeals were heard by the Sidewalk Appeals Committee. The individuals who sat on the Sidewalk Appeals Committee were the City Engineer, the Assistant City Solicitor, and the Director of Public Works or his designee. All of these officials participated directly in the original decisions to revoke plaintiffs' permits on the grounds that plaintiffs' publications constitute commercial handbills.

18. Plaintiffs' petitions were denied, and they were requested to remove their dispensing devices.

19. The City of Cincinnati has agreed not to interfere with plaintiffs' dispensing devices until a ruling on the merits of this case is made. Those devices are still present in the public right of way.

CONCLUSIONS OF LAW

1. The test for identifying commercial speech is whether the communications "propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

2. Where commercial and noncommercial speech are "inextricably intertwined," the entire communication is classified as noncommercial. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988). Noncommercial aspects of speech are "inextricable" where it is impossible to sell the advertised items without the noncommercial speech or where the noncommercial speech is required to be combined with commercial message. *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989).

3. The publications distributed by Discovery Center and Harmon Publishing Company constitute forms of commercial speech. Both publications propose commercial transactions in that they are primarily intended as advertisements. Home Magazine, published by Harmon Publishing, advertises real estate available in the greater Cincinnati area. Discovery Center's publication is intended to advertise for-profit programs offered by Discovery Center. Neither publication contains noncommercial speech that is inextricably intertwined with the commercial speech. There is no law requiring the editorials in question to be published together with advertisements for educational or social programs or real estate.

4. Commercial speech is entitled to First Amendment protections if it concerns lawful activity and it is not misleading. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

5. The publication distributed by Discovery Center and Harmon Publishing Company are entitled to First Amendment protections. Both publications concern lawful activity and neither publication is misleading.

6. The City of Cincinnati may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

7. A government restriction on commercial speech is valid if "the regulation directly advances the governmental interest asserted, and . . . it is not more extensive than is necessary to serve that interest." *Central Hudson*

Gas & Electric Co., 447 U.S. at 556. This test does not require that the regulation be the least restrictive means available to further the interest. *Board of Trustees of State University of New York v. Fox*, ___ U.S. ___, 109 S.Ct. 3028 (1989). Rather, it requires a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 3035 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986)). The fit must be "one whose scope is 'in proportion to the interest served.'" *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

8. The burden is on the government to affirmatively establish the reasonable fit required. *Id.*

9. Based upon these standards, we find that the City of Cincinnati has failed to affirmatively establish such reasonable fit. Complete prohibition of commercial handbills on any public right of way is an excessive means by which to accomplish the governmental objectives of safety and aesthetic appeal. The "fit," in this case, is unreasonable. The number of dispensers dispensing commercial handbills (62) on the public right of way is minute in comparison to the total number of dispensing devices on the street (1500 - 2000), and such dispensers effect public safety and aesthetics in only a minimal way. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting the speech in question. This court has no doubt that the city acted in good faith,

here, with the intent only to protect the citizens of Cincinnati. However, freedom of speech is a fundamental constitutional right, and the city acted somewhat overzealously in executing its good intentions. While the City's objectives of promoting safety and aesthetics are substantial, complete prohibition of the devices in question is unreasonable and violative of plaintiffs' fundamental First Amendment rights.

10. A basic requirement of due process is a fair trial before a fair tribunal. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *In re Murchison*, 349 U.S. 133 (1955). This rule is equally applicable to administrative agencies which adjudicate issues. *Withrow v. Larkin*, 421 U.S. 35 (1975). The fact that the same agency or persons combine both investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias. *Larkin*, 421 U.S. at 47. One who makes such a contention has a "much more difficult burden of persuasion to carry." *Id.* The plaintiff must overcome a presumption of honesty and integrity in those individuals serving as administrative adjudicators. *Id.* The fact that those on the adjudicating committee have previously stated that a request should be denied based on its prior *ex parte* investigation does not necessarily mean that the minds of its members were irrevocably closed to the merits of plaintiffs' arguments. *Id.* at 48.

11. Based upon these standards, we find that the mere fact that the same individuals who made the original decision also sat on the Sidewalk Appeals Committee is not sufficient to deem the practice unconstitutional. The original decision was based on its prior *ex parte* investigation. The final decision was made by the Sidewald [sic] Appeals Committee after hearing arguments by

each plaintiff. There is no allegation that the city officials acted dishonestly or in bad faith. The plaintiffs have failed to overcome the presumption of honesty and integrity in those individuals serving as administrative adjudicators.

CONCLUSION

Accordingly, for the reasons set forth above, we find that the regulatory scheme advanced by the City of Cincinnati completely prohibiting the distribution of commercial handbills on the public right of way violates the First Amendment. However, the manner in which the City currently handles appeals of decisions regarding permits that are denied does not violate the Fourteenth Amendment. Judgment shall be entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue.

SO ORDERED.

Dated: 8/21/90

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States
District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION

DISCOVERY NETWORK,
INC. et al

JUDGMENT IN
A CIVIL CASE

V.

CASE NUMBER:

CITY OF CINCINNATI

C-1-90-437

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue.

23 August 1990

Date

KENNETH J. MURPHY

Clerk

/s/ Illegible

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DISCOVERY NETWORK,
INC.,

and

HARMON PUBLISHING
CO., INC.,

Plaintiffs,

-vs-

CITY OF CINCINNATI,

Defendant.

Notice is hereby given that Defendant City of Cincinnati, above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment in favor of the plaintiffs entered in this action on the twenty-third (23rd) day of August 1990.

Respectfully submitted,

/s/ Richard A. Castellini
RICHARD A. CASTELLINI
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City Solicitor

/s/ Mark S. Yurick
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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 24

No. 90-3817

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCOVERY NETWORK, INC. and)

HARMON PUBLISHING CO.,)

Plaintiffs-Appellees,)

v.)

CITY OF CINCINNATI,)

Defendant-Appellant.)

ON APPEAL from the
United States District
Court for the Southern
District of Ohio

Decided and Filed October 11, 1991

Before: KRUPANSKY and BOGGS, Circuit Judges;
and DUGGAN, District Judge.*

BOGGS, Circuit Judge. The case involves the constitutionality of Cincinnati's ordinance prohibiting the distribution of commercial handbills on public property.

*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

This ordinance effectively grants distributors of "news-papers," such as the *Cincinnati Post*, *USA Today*, and the *Wall Street Journal*, access to the public sidewalks through newsracks, while denying that same access to distributors of "commercial handbills." The district court rendered a judgment preventing enforcement of this ordinance because it violates the first amendment. The city appealed, arguing that the ordinance was constitutionally permissible as a regulation of "commercial speech" because of the "lesser protection" such speech is afforded under the first amendment. Because we believe that "commercial speech" only receives lesser first amendment protection when the governmental interest asserted is either related to regulating the commerce the "commercial speech" is promoting, or related to any distinctive effects such commercial activity would produce, and neither governmental interest is asserted here, we affirm the district court.

I

Plaintiffs are publishers of publications distributed throughout the Cincinnati metropolitan area. Discovery Network publishes a magazine that advertises learning programs, recreational opportunities, and social events for adults. Harmon Publishing publishes and distributes *Home Magazine*, which lists houses and other residential real estate for sale or rent. Both plaintiffs use newspaper dispensing devices ("newsracks") placed on public right-of-ways to distribute their publications.

Both plaintiffs had been given permission by the city to place newsracks along public right-of-ways to distribute their publications according to Amended Regulation

38.¹ Their status changed, however, in February 1990 when the City Council passed a motion requiring the Department of Public Works to enforce the existing ordinance prohibiting the distribution of "commercial handbills" on public property. *Cincinnati Municipal Code* § 714-23.² Plaintiffs brought suit under 42 U.S.C. § 1983,

¹ The Amended Regulation reads in pertinent part as follows:

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. . . . The site plan and request to place newspaper vending device [sic] in public right-of-way [sic] must be presented to and approved by the City Manager or his designee prior to the placement of the device. . . .
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems. . . .
6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person . . . with the City Manager. . . . This contact person shall be able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

² A "commercial handbill" is defined as:
any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or
(Continued on following page)

requesting declaratory and injunctive relief. This case ultimately came before the district court for an evidentiary hearing on two issues: whether the regulation violated plaintiffs' first amendment rights, and whether the city's mechanism for appealing the administrative decision to enforce the ordinance violated plaintiffs' right to due process.

The court held that hearing on July 9, 1990. In that hearing, the city contended that the newsracks pose aesthetic and safety problems for the city. The aesthetic problems arise because of the non-uniform design and color schemes of the different types of newsracks. The safety problems arise because the racks are placed near busy streets, especially near crosswalks and bus stops. They are also attached by chains to city fixtures, such as lightpoles, causing the fixtures to rust. However, there

(Continued from previous page)

otherwise reproduced original or copies of any matter of literature:

- (a) which advertises for sale any merchandise, product, commodity or thing; or
- (b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or
- (c) which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

Cincinnati Municipal Code § 701-1-C.

are currently no city regulations establishing any safety or aesthetic standards for newsracks.

Neither the City Architect nor the City Engineer could distinguish the commercial from the non-commercial newsracks. In fact, the Architect testified that the city's aesthetic concerns would be alleviated by an ordinance regulating the color and size of all newsracks. Both witnesses seemed primarily concerned about the potential proliferation of the total number of newsracks as a result of newsracks distributing commercial speech. The Engineer testified that the only areas in which commercial newsracks differed from non-commercial newsracks was in the potential for proliferation, and in the enhanced first amendment protection accorded to devices dispensing non-commercial publications. He believed such proliferation was likely because he had received four requests for permits from commercial publishers for newsrack permits in the prior two years, the first such requests he had ever received.³ The Architect's testimony

³ This argument rests on the assumption that there is an infinite number of commercial publishers who might seek permits, but only a finite number of non-commercial publishers. In light of the growing nationalization of newspapers in this country, that assumption is somewhat tenuous at best. The city provided no direct evidence regarding the increase in the number of non-commercial publishers dispensing their wares through newsracks. However, the Architect testified that "it was not very long ago that the *Cincinnati Post* and the *Cincinnati Enquirer* were the only ones with dispensing devices on the City streets." We take judicial notice of the fact that *USA Today*, the *New York Times*, the *Wall Street Journal*, and the *Business Courier* all have dispensing devices on the corner across from the Federal Courthouse.

followed the Engineer's, as he believed that permitting plaintiffs' newsracks to remain would send a signal to other commercial publishers that newsracks were a permissible way to distribute the publications, thereby increasing the number of racks.

The court ruled in favor of the city on the due process claim, but in favor of the plaintiffs on the first amendment claim. The court reached many conclusions of law: that the publications were commercial speech within the meaning of the first amendment because they proposed commercial transactions in the form of advertisements;⁴ that commercial speech was entitled to first

⁴ In this case, plaintiffs do not question the contours of the delineation between "commercial" and "non-commercial" speech. We will thus adopt and adhere to that terminology, although we find it somewhat anomalous to denominate as "non-commercial" institutions such as the *New York Times* and Gannett (publisher of the *Cincinnati Post*), each of which has assets and revenues in the billions of dollars, and profits in the many millions of dollars.

Obviously, a quite significant part of the space in "news-papers" is devoted to purely commercial activities, while publications such as plaintiffs' may (and certainly could easily) contain some editorial material, such as comments or articles on education or real estate matters. The first amendment by its terms does not make this distinction; it protects "speech." An analogous practice, deciding on content-based grounds which beliefs merit classification as "religion" protected by the establishment and free exercise clauses of the first amendment, has been severely limited by courts to avoid impermissible government interference into protected activity. See *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Ballard*, 322 U.S. 78 (1944). See also G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, *Constitutional Law* 1369-73 (1986).

amendment protection where, as here, the activities promoted were lawful and the speech itself not inherently misleading; and that the ordinance would be measured against the four-part test announced by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). That test provides that a government regulation will be upheld if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and, (4) is not more extensive in its regulation of speech than is necessary to serve that interest. *Id.*

The court focused its analysis on the last part of that test. The court applied the Supreme Court's interpretation of the fourth part of the *Central Hudson* test in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). The *Fox* Court stated that a regulation is not more extensive than necessary when it is a reasonable fit between the ends directly advanced by the statute and the means chosen as embodied in the regulation. *Fox*, 492 U.S. at 480. The Court held that the government has the burden of proving the reasonableness of that fit. *Id.*

The district court's analysis led it to conclude that the city's ordinance did not constitute a reasonable fit between its asserted ends and the means chosen. The court held that a complete ban on newsracks distributing commercial speech violated the *Fox* test. Only 62 of the between 1,500 and 2,000 newsracks present on the city's streets belonged to the plaintiffs. Based on the city's concession that newsracks dispensing "non-commercial" papers caused the same problems as those distributing commercial papers, the court held that the regulation was an excessive means to accomplish the stated ends.

Cincinnati timely appealed the court's determination.⁵

II

A

Both parties agree on the legal contours within which this case must be decided. Both parties agree that this case requires the application of the four-part *Central Hudson* test, and that the interpretation given by the Supreme Court to the fourth part of that test in *Fox*. Both parties agree that this ordinance satisfies the first two parts of the test: in this case it regulates purely commercial speech,⁶ and Cincinnati's interests in street safety and city aesthetics are substantial. As it is clear that the ordinance directly advances the purposes asserted, we have only one issue before us: Does Cincinnati's ordinance banning the distribution of commercial handbills along city streets and sidewalks prescribe a "reasonable fit" between the ends asserted and the means chosen to advance them? We hold that it does not.

⁵ The plaintiffs have not cross-appealed from the court's judgment for the city on the due process claim.

⁶ However, it should be noted that the ordinance can also be applied to "newspapers." All newspapers advertise products for sale, or direct attention to business establishments for the purpose of directly or indirectly promoting the sales thereof (restaurant or theater reviews), or direct attention to events of any kind for which an admission fee is charged for the purpose of private profit (Reds or Bengals games).

B

In establishing the "reasonable fit" requirement, the Court in *Fox* attempted to draw a middle ground between greater and lesser review of a regulation of commercial speech. The Court expressly rejected imposing either a "least restrictive means" or a "rational basis" standard of review on regulations of commercial speech. *Fox*, 492 U.S. at 479-81. The Court rejected the least restrictive means approach as inconsistent with its prior commercial speech jurisprudence, and rejected the rational basis approach because "[t]here it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost." *Fox*, 492 U.S. at 480. The Court described its "reasonable fit" approach as one "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' . . . Here we require the government goal to be substantial, and the cost to be carefully calculated." *Id.* We presume that the cost referred to by the *Fox* Court is that which would accrue because of the burden placed on the commercial speech, and that the *Fox* test requires that such costs must be outweighed by the benefits of the asserted regulation. We can only make that calculation if we know what value the Court has placed on commercial speech, and it is to that consideration that we now turn.

C

Commercial speech has unquestionably been protected by the first amendment since the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), held that the

Court's prior offhand statement in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that "purely commercial advertising" was not protected did not establish an exception to first amendment protection. The Court recognized in *Virginia Citizens* that commercial speech, though it may not touch upon the highest topics of human existence (indeed, much protected speech does not), is important to the public welfare. The Court noted in *Virginia Citizens* that speech uttered solely for economic motives has high value to those who listen to it. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Citizens*, 425 U.S. at 763. In recognizing the importance of commercial speech to private economic activity, the Court was once again affirming that the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge" is "essential to the orderly pursuit of happiness by free men." *Board of Regents of State College v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court recognized that having made this decision, one with which we have no quarrel, commercial advertising is essential because it conveys information that permits each person to decide which trades and economic decisions are best for that person. See *Virginia Citizens*, 425 U.S. at 764. "Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." *Id.* at

765. As such, commercial speech also has a high value to the society as well.

The Court did not mean to free commercial speech from all regulation and create some sort of an advertiser's paradise. The Court noted that time, place, and manner restrictions could be applied to commercial speech, provided that such restrictions are content-neutral. *Virginia Citizens*, 425 U.S. at 771. False and misleading speech could also be regulated or banned, *id.*, including types of commercial speech that may merely be likely to deceive the public. Also, speech proposing illegal commercial transactions may be banned. *Id.* at 772. As at least the prior regulation of speech considered potentially false or misleading would be impermissible if applied to political speech, the Court's decision effectively left commercial speech with lesser protection than that afforded to other types of speech. The Court has continued to adhere to these principles in its subsequent commercial speech jurisprudence. See *Central Hudson*, 447 U.S. at 563-64.

This "lesser protection" afforded commercial speech is crucial to Cincinnati's argument on appeal. Cincinnati argues that placing the entire burden of achieving its goal of safer streets and a more harmonious landscape on commercial speech is justified by this lesser protection. The city correctly notes that many courts have held that a city cannot ban newsracks containing traditional newspapers that comment on current affairs, thereby precluding it from alleviating its problem by completely banning newsracks from the city.⁷ It asks us to hold that, in light

⁷ See *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991), and cases cited therein.

of that restriction, its policy of banning only newsracks distributing commercial speech is a cost-effective way of alleviating its problem, and therefore meets the *Fox* test.⁸

The fact that commercial speech is owed less protection than is political speech does not lead to Cincinnati's conclusion that commercial speech has a low value in first amendment jurisprudence. "While [the plaintiff's] speech is primarily commercial in nature, and thereby not subject to all of the traditionally stringent protections of the first amendment, it is nevertheless entitled to substantial protections." *American Motors Sales Corporation v. Runke*, 708 F.2d 202, 208 (6th Cir. 1983). Our examination of that jurisprudence shows us that the lesser value placed on commercial speech only justifies regulations dealing with the content of the speech itself, or with distinctive effects that the content of the speech will

⁸ Cincinnati also argues that we should defer to the city's decision so long as it is reasonable. It draws this conclusion from two sentences in *Fox* that "we have been loath to second-guess the Government's judgment," *Fox*, 492 U.S. at 478, and that "[w]ithin those bounds [the reasonable fit test] we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. We do not believe that these statements command us to give the city the benefit of the doubt in close cases, as Cincinnati would have it. Rather, they are meant to distinguish the Court's test in *Fox* from the least restrictive means test urged on the Court by the defendant. A least restrictive means test can be satisfied by only one method of regulation, while the *Fox* test can be satisfied by many different methods. If the Court's words mean what Cincinnati argues they do, then the *Fox* Court's subsequent rejection of the fourteenth amendment rational basis test would be a glaring inconsistency.

produce. In every commercial speech case but one,⁹ a regulation upheld as constitutional by the Court fell into one of two groups. In the first, the regulation sought to ban speech believed to be inherently false or misleading.¹⁰ In the second group, the regulation sought to

⁹ That one case is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Metromedia*, the Court overturned an ordinance that banned outdoor, off-site advertising displays as an attempt to increase traffic safety and enhance appearance. These interests are very similar to those advanced by Cincinnati in defense of its ordinance. The ordinance at issue in *Metromedia* is also the only regulation of commercial speech that has yet come before the Court where a government attempted to do what Cincinnati is trying so here, regulate a manner of conveying commercial speech in order to combat perceived evils wholly unrelated to the commercial content of that speech. Thus, if the majority of the Court had upheld San Diego's statute as a permissible regulation of commercial speech, we would be compelled to reverse the district court. However, only a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech. The concurrence specifically – and vehemently – disagreed with that conclusion. See *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). The Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech. *Metromedia* 453 U.S. at 521. As the Court has stated that "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds,'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)), we do not view the plurality dicta in *Metromedia* as controlling the outcome of this case.

¹⁰ See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (regulation banning

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alleviate distinctive adverse effects allegedly caused by and directly flowing from the type of commercial speech regulated.¹¹ It is clear that Cincinnati's ordinance does

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the use of illustrations in lawyer advertising and banning statements in such advertisements offering legal advice and information as misleading unconstitutional; regulation requiring disclosure that legal "fees" and "costs" are distinct financial obligations in retaining a lawyer to avoid misleading public constitutional); *Friedman v. Rogers*, 440 U.S. 1 (1979) (statute prohibiting the advertisement of optometry practices through trade names as misleading constitutional). The Court also ruled many regulations to be unconstitutional in this group. See *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281 (1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleading unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleading unconstitutional).

¹¹ See *Posades De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (statute banning advertising of casino gambling directed to Puerto Rico residents to prevent bad effects on morals of residents constitutional); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (regulation banning in-person solicitation of accident victims for legal business because victims may be coerced into hiring lawyer constitutional); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (regulation setting different zoning regulations for pornographic theatres or bookstores to prevent neighborhood deterioration and crime increases constitutional). The Court has also declared many regulations to be unconstitutional that fall into this category. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466

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not attempt to regulate plaintiffs' speech because it is false or misleading. Therefore, plaintiffs' speech receives lesser first amendment protection only if Cincinnati's reason for regulating it falls into the second group of cases. We can best demonstrate what sort of rationale for regulation is included in the second group by listing a few examples.

In each case where the Court *upheld* a regulation on commercial speech that attempted to burden that speech because of perceived adverse effects on the community, those effects flowed naturally from personal actions fostered by the commercial content of the speech itself. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Detroit passed a zoning ordinance requiring sexual entertainment establishments to be at least 1000 feet apart

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(1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Bolger, et al. v. Youngs Drug Product Corp.*, 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *Central Hudson* (statute preventing promotional advertisement by electric utility to conserve energy unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (regulation banning advertisement of prices for routine legal services because of concern that legal professionalism will decline unconstitutional); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); *Virginia Citizens* (statute banning price advertising by pharmacists because of concern that pharmacists' professionalism would decline unconstitutional).

from one another. The city believed that permitting such establishments to be closer would foster crime, prostitution, and neighborhood decay. However, the adverse effects of increased crime, prostitution, and neighborhood decay would allegedly occur because of the sort of person attracted to the location of these businesses. Also, in *Posados de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Commonwealth banned advertising of casino gambling that was directed at or detectable by Puerto Rican citizens. The reason given was that fostering gambling among Puerto Ricans would disrupt moral and cultural patterns, increase crime and prostitution, and foster organized crime and corruption. These problems, however, would all arise because Puerto Ricans would be more likely to frequent casinos and gamble if they were exposed to casino advertising. In each case, the adverse effect would occur as a direct result of persons acting upon the commercial content (availability of sexual entertainment, availability of casino gambling) of the speech regulated.

These observations destroy Cincinnati's argument in favor of its ordinance. The defense of that ordinance rests solely on the low value allegedly accorded to commercial speech in general. However, we observe that the Court actually accords a high value to commercial speech except in the two specific circumstances outlined above. Neither of them are present here. Cincinnati is not regulating the content of plaintiffs' publications. Neither is Cincinnati attempting to alleviate a harm caused by the content of the publications. Cincinnati is attempting to place a burden on a particular type of speech because of harms caused by the *manner* of delivering that speech.

"We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Central Hudson*, 447 U.S. at 566 n.9. Cincinnati's non-speech related policy does not survive that special review.

If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances, then Cincinnati's ordinance cannot be a "reasonable fit." Plaintiffs will bear a very heavy burden by being completely deprived of access to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance; Harmon, 15%. The benefit gained by the city, on the other hand, is miniscule. Plaintiffs own only 62 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden placed on it by Cincinnati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance. While Cincinnati argues that this is the best option open to it in light of the protection afforded to newsracks dispensing traditional newspapers, "the First Amendment does not permit a ban on certain speech merely because it is more efficient" than other alternatives. *Shapero*, 486 U.S. at 473.

In contrast to Cincinnati's fears, it has many options open to it to control the perceived ill effects of newsracks apart from banning those dispensing commercial speech. To the extent that the use of chains to fasten the newsracks is unsafe, a regulation requiring that all newsracks be bolted to the sidewalk would solve the problem. To the

extent that aesthetics are a concern, a regulation establishing color and design limitations upon all newsracks would fit the bill. In fact, counsel for Cincinnati admitted at oral argument that it is currently working on an ordinance of this sort with representatives of traditional newspapers. To the extent that the number of newsracks is disturbing, the city can establish a maximum number of newsracks permitted on city sidewalks, and distribute them either through first-come, first-serve permit rationing or by selling permits to the highest bidder. We are confident that many more options exist for the city, so long as they do not treat newsracks differently according to the content of the publications inside.

III

We also write briefly to explain why Cincinnati's ordinance does not pass constitutional muster on other grounds. The ordinance treats newsracks differently on the basis of the commercial content of the publications distributed. Cincinnati's ordinance, therefore, cannot qualify as a constitutional time, place, and manner restriction because it is not content-neutral. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Rzadkowlowski v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586, 590 (6th Cir. 1987) ("the Billboard Act and regulations apply evenhandedly to commercial and non-commercial speech; they discriminate against no view or subject matter"). A content-neutral speech regulation is one "justified without reference to the content of the regulated speech," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Cincinnati's

argument on appeal, in contrast, relies on the lesser protection allegedly accorded to commercial speech.¹²

Cincinnati could argue that its ordinance is content-neutral because it was not "adopted . . . because of disagreement with the message [the regulated speech]

¹² Nor does Cincinnati's ordinance qualify as content-neutral under the "secondary effects" doctrine promulgated by the Court in *Playtime Theatres*. There, the city enacted a zoning ordinance keeping sexual entertainment movie theaters 1,000 feet apart from a residential zone, church, or park, and one mile from any school. The Court in *Playtime Theatres* stated that the ordinance was content-neutral, and therefore reviewable under the time, place, and manner regulation standard, because the primary concern of the city in enacting the ordinance was to control the secondary effects caused by the theaters. *Playtime Theaters*, 475 U.S. at 48. While Cincinnati is attempting to control effects on the city's landscape and fixtures, these effects are neither secondary nor caused by the speech being regulated. In *Playtime Theaters*, the effects – increased crime and decreased neighborhood quality, among others – were secondary to the primary effect of the theaters; the dissemination of sexually explicit entertainment. Here, the very existence of different types of newsracks causes aesthetic problems for the city. Additionally, in *Playtime Theaters*, the effects were caused by the nature of the speech disseminated in the theaters. Here, the effects newsracks may have on the city's aesthetic and safety interests are the same for all newsracks, whether the publications inside are commercial or non-commercial speech.

Had Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, such as the clogging of downtown streets caused by auto buffs crowding around to obtain the latest issue of *Auto World*, the ordinance may have been constitutional under the secondary effects doctrine. This, however, is not the case.

conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Cincinnati could argue that its enforcement of the ordinance is directed solely at the aesthetic and safety problems caused by newsracks, and therefore is not a content-based decision. However, we cannot accept that argument for two reasons. First, Cincinnati's position is based on the argument that it can treat newsracks distributing commercial speech differently than those distributing commentary on public affairs. Given the wide range of options open to the city to control the perceived ill effects of newsracks without completely banning those distributing commercial speech, we find it hard to believe that the city does not in fact favor the distribution of newspapers such as the *Cincinnati Post* and the *Cincinnati Enquirer* on its street corners over that of *Home Magazine*. The failure of the city to even include representatives of plaintiffs – and other publishers of commercial publications – in its ongoing discussions with newspaper representatives regarding aesthetic and safety regulations governing newsrack appearance and fastening provides further proof of an unadmitted bias against commercial speech.¹³ Second, Cincinnati's hypothetical argument

¹³ The Architect's testimony is illuminating on this point.

Q: Does the City have means to deal with the proliferation of non commercial publishers who are seeking City permits?

A: The City is attempting to work cooperatively with the non commercial publishers to place the devices in an orderly manner and in some cases to agree to certain standard devices, particularly in the center business district.

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only addresses the enforcement of the ordinance. The ordinance itself was on the books long before this problem supposedly arose. There is no argument advanced that the ordinance's ban on distribution of commercial handbills, by any method, not merely by newsracks, was not directed against commercial speech based on its content.¹⁴

Nor can the ordinance pass muster as a valid content-based restriction. "Content based restrictions 'will be upheld only if narrowly drawn to accomplish a compelling governmental interest.'" *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (White, J., dissenting) (quoting *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989)). This standard has been

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Q: Can't those very same regulations be applied to commercial publishers?

A: They could if commercial publications were considered legal.

¹⁴ Cincinnati's ordinance would not pass muster even if it met the requirement that it be content-neutral. The second part of the time, place, and manner standard is that the regulation be "narrowly tailored to serve a significant governmental interest." *Rock Against Racism*, 491 U.S. at 796 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The ordinance is not narrowly tailored because there are many options available to the city that would address its aesthetic, safety, and proliferation concerns without placing the significant burden on commercial speech that the ordinance does. See *supra*, at pp. 12-13. None of these options would be less effective in promoting the asserted interests than is the complete ban on distribution of commercial handbills. See *Rock Against Racism*, 491 U.S. at 799-800.

interpreted to require a government to choose the least restrictive means to further the governmental interest. *Sable Communications*, 492 U.S. at 126. The ordinance is clearly not the least restrictive means, as it places a substantially greater burden on commercial speech than is necessary to alleviate the city's aesthetic and safety concerns.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

[p. 50] THOMAS E. YOUNG DEPOSITION

location in which four dispensing devices are distributing commercial and two non commercial? What's the difference aesthetically or safety?

A. I don't see that there is an aesthetics difference between that specific comparison. In addition to dealing with the proliferation though, and the numbers of devices of these specific commercial publications, is the always present near certainty of proliferation.

Q. You use the word proliferation and you have been using it repeatedly. What do you mean by proliferation?

A. More and more companies choosing to distribute commercial handbills.

Q. You've been involved now as City Engineer with this permit system for approximately five years?

A. Yes.

Q. In those five years, how many publishers who wished to dispense, again for purposes of this deposition we'll call them commercial publications, have applied for permits?

A. We've indicated that there have been four and I should point out that all of those have occurred within essentially the last two years. A total [p. 51] of four, of that total of five.

Q. Do you know what the total number of machines are that were put out on the City right-of-way by these four publishers?

A. We have the information that they have supplied on their applications. I don't personally remember the numbers, no.

Q. Do you have any idea of what percentage of total number of newsracks are on the streets?

A. It's a relatively small percentage.

Q. Do you anticipate a greater number of newsracks out on the street by commercial publishers?

A. Yes.

Q. What makes you anticipate that?

MR. GANULIN: You mean were the City ordinance prohibiting it to be disallowed by the Court?

Q. Assuming the clarification from Mr. Johnson had not come out in February of 1990, would you then have anticipated a greater number of permit applications by commercial publishers?

A. Yes. And my original answer was based on that assumption, that that was the question that you asked.

Q. And that assumption was based on the fact you had four in the last two years?

[p. 52] A. Yes.

Q. Have you had a proliferation in the number of applications by non commercial publishers?

A. Yes.

Q. And can you give me an idea over the last couple years how many or what the rate of increase has been for non commercial publishers?

A. I don't have that, very obviously, figures without going in detail into the application forms but it was not very long ago that the Cincinnati Post and the Cincinnati Enquirer were the only ones with dispensing devices on the City streets. And the others have all come in within a relatively short period of time in terms of the life of the City.

Q. Does the City have means to deal with the proliferation of non commercial publishers who are seeking City permits?

A. The City is attempting to work cooperatively with the non commercial publishers to place the devices in an orderly manner and in some cases to agree to certain standard devices, particularly in the center business district.

Q. Can't those very same regulations be applied to commercial publishers?

A. They could if commercial publications [p. 53] were considered legal.

Q. Assuming that they were, again for purposes of this deposition, is there any reason why the City could not apply the same regulations and controls to commercial publishers as it could to non commercial publishers?

A. No.

Q. Is there any reason why the City's aesthetics and the City's safety concerns couldn't be protected and advanced by regulatory controls uniformly applied to both commercial and non commercial publishers as relates to newsracks?

MR. YURICK: Objection to that question but you can go ahead and answer if you can.

A. I would like you to restate that. (Whereupon, the pending question was read by the court reporter.)

MR. GANULIN: Is the number of boxes the same in your question? In other words, is he comparing just commercial just noncommercial boxes to the same number of mixed non commercial and commercial? Are you asking him if the aesthetics and safety concerns could be figured in with the addition of commercial boxes?

MR. MEZIBOV: I'm asking Mr. Young if the City's concerns for aesthetics and safety could not

* * *

TRIAL TESTIMONY

ROBERT H. RICHARDSON

[p. 8] A. I'm principle architect for the City, right.

Q. And as -

THE COURT: Ruben Cohen resigned or retired?

THE WITNESS: He has, yes, several years ago.

THE COURT: Thank you.

Q. As City Architect, Mr. Richardson, you're concerned with the architecture, esthetics and safety as relates to public areas and public buildings in the City?

A. Yes, sir.

Q. And this would include the City right-of-ways; is that correct?

A. Yes.

Q. I do understand correctly as City Architect it's your responsibility to coordinate the various City agencies which have some impact on the public environment?

A. We work in conjunction with all the divisions of Public Works to do that, yes.

Q. And it's correct, is it not, Mr. Richardson, that at present - that at present nor in the past several years has the City adopted formally any rules, regulations, or policies governing esthetics with respect to structures located on the public right-of-way?

A. They have attempted to develop standards starting in 1979, but none of which have been accepted into law at this point.

Q. So if I went to the City code book, I would not find any [p. 9] laws which would govern -

A. You would find -

Q. - esthetics?

A. You would find Regulation 38, whatever that says.

Q. And you're not aware then, are you, at this time, Mr. Richardson, of any newsracks whether they distribute commercial or non-commercial publications which are in violation of any particular City law, rule or policy regarding either esthetics or safety?

MR. YURICK: I'm sorry; I'm going to object.

THE COURT: I'll sustain the objection. I think that you understand the question, what he's asking you.

THE WITNESS: Yes, sir.

THE COURT: Well, I think he's drawing a distinction between laws that have been enacted and rules and regulations which may or may not have been enacted by the City Council but have been some media put out by the City Manager, and I think he wants you to draw a distinction, so go down the list. Are there any laws? Start out with that.

Q. Mr. Richardson, is it correct there are no laws – and by "laws" we're talking about regulations which have been enacted by the City Council and made part of the City – Cincinnati Municipal Code – which govern esthetics on the public right-of-way as relates to structures placed on the City right-of-way?

[p.10] MR. YURICK: –Your Honor, I'm going to object to the question. I'm not –

THE COURT: What's the basis for your objection?

MR. YURICK: Actually there are two bases. For one basis, I think that the Court can take judicial notice of the laws that are in the Municipal Code and I think those have been pointed out to the Court in the trial brief and, No. 2, I don't believe Mr. Richardson has been qualified or sufficient foundation has been laid –

THE COURT: He is the City Architect and he has to make decisions concerning these matters, so I think he would certainly know what the laws and regulations are if that is his principle occupation. I'm going to overrule since this is particularly – it is a non-jury trial. I think I can weigh the evidence and determine that.

MR. YURICK: Thank you, Your Honor.

THE COURT: Overruled. Now he is asking you concerning any laws regarding governing esthetics and right-of-ways.

THE WITNESS: The existing laws are simply what is in the Municipal Code, and I think it's Chapter 718 and also Administrative Regulation 38 which is an administrative regulation of the City Manager.

THE COURT: What's Chapter 718?

THE WITNESS: It's dealing with the use of the public [p. 11] right-of-way and revocable street privileges in the Municipal Code.

Q. Does that Code 718 in any way relate to esthetics?

A. It relates to placement of these devices, or what-not, and use of the public right-of-way that may or may not relate to esthetics.

Q. You used the term "718." Is it 911 that you're referring to?

A. I don't know the exact section of it.

Q. I'm going to ask you to look at the exhibit book.

MR. MEZIBOV: If I might, Your Honor.

THE COURT: You may. Would you hand –

MR. MEZIBOV: Ms. Schaeffer will hand you a copy of that. (Clerk complying.)

Q. I'm going to ask you to look at Exhibit No. 1.

A. Is that marked A-3?

Q. It's also A-3. That was a deposition exhibit.

THE COURT: It should have a tab on it -

THE WITNESS: Yes.

THE COURT: - down at Plaintiffs, Exhibit 1.

Q. Is that Amended Regulation 38?

A. Yes, sir.

Q. Now is that amended regulation part of the City Municipal Code?

[p. 12] A. Regulations are regulations by the City Manager, City of Cincinnati. They are not directly part of the Municipal Code, no.

Q. Now, does Amended Regulation 38 pertain to newsracks on the City right-of-way?

A. Yes, sir.

Q. Does it in any way govern esthetics concerns as relates to those newsracks?

A. No.

Q. Does it in any way relate to safety concerns as relates to newsracks?

A. Yes.

Q. In what way?

A. It basically addresses the ability of placing them in the right-of-way and in a position that would not interfere with safety in terms of handicap or crosswalks

or fire or police or whatever, parking, that kind of thing. But for the most part, it allows the individual to place them within the right-of-way and remove them if someone requests that there is a problem about them. There is no specific language.

Q. Are there any other rules or policies which have not been enacted into law which to your knowledge govern newsracks on the City right-of-way?

A. Which have not been enacted?

Q. Correct.

[p. 13] A. There is currently a draft set of guidelines that the various City agencies and newspaper companies have been working on for the Downtown, and at this point in time several streets have already been implemented in terms of a -

THE COURT: Well, now you say this is something that is being reviewed by the City departments?

THE WITNESS: Yes, sir.

THE COURT: Is it something that's been promulgated and published as being in the course of action the City is going to follow or is the City still studying the problem?

THE WITNESS: The newspaper companies collectively decided to file it on their own. They are implementing the plan. It has not been approved by the City Council or City Manager at this point.

Q. Now, in reference to that particular piece of proposed legislation, I'm going to ask you to turn to Trial

Exhibit No. 3 in that booklet. Do you have that in front of you?

A. Yes.

Q. Is that the proposed regulation you've just made reference to?

A. Yes, sir.

Q. Now, this has a date in the upper right-hand corner of June 14th, 1990; is that right?

A. Yes, sir.

Q. To your knowledge, is this proposed regulation to be [p. 14] enacted into law?

A. That is the intention. At this point in time there is a disagreement on, I think, three separate guidelines that are within this document with the various newspaper companies, so it has not been enacted into law at this time.

Q. You say there is a disagreement between the City and certain news publishers with respect to the provisions -

A. I think there are three guidelines. Three of the fifteen there is a disagreement on, yes.

Q. Which of the three is there a disagreement on?

A. No. 2, No. 9, and No. 15.

Q. With respect to No. 2, what does that govern?

A. It governs the specifics of where you can place a newsrack within the right-of-way, whether it can be in front of a crosswalk or handicap ramp or bus stop.

Q. What is the nature of the disagreement with the news publishers as you understand it?

A. They agree in concept, but feel if it is written down, it's too specific, that someone could interpret the fact that it cannot be in a bus stop, that it cannot be in any bus stop at any time or within a parking space or fire hydrant. They agree not to place it within these areas but they at this point have not agreed that -

THE COURT: How do you define a bus stop as a for instance?

[p. 15] THE WITNESS: I think that is one of the issues.

THE COURT: Is a bus stop the 30 or 40 feet from the place where the bus stop is, on a telephone pole or something or other -

THE WITNESS: Yes.

THE COURT: - along the curb?

THE WITNESS: The bus stop is marked in the beginning by an orange stripe on the pole.

THE COURT: Excuse me. Stopping right there, would they be permitted to, under this proposal here, to mount these, say, just downstream as opposed to upstream? You know what I'm talking about, upstream and downstream?

THE WITNESS: Yes, sir. There is also an area that is marked on a bus stop on a traffic pole.

THE COURT: On either side of the poles they can put them?

THE WITNESS: On either side they could put them, right.

Q. You indicated the City is negotiating with certain parties with respect to these terms; is that correct?

A. Yes, sir.

Q. Those parties consist of *The Cincinnati Enquirer*, *The Cincinnati Post*; is that correct?

A. That's two of them. There are several others involved also.

[p. 16] Q. Who are those others?

A. *USA Today*, *Wall Street Journal*, *New York Times*, *The Courier Journal*, *The News Record* and *Business Courier*. I think that is all.

Q. These are all publishers who currently have newsracks out and about the City right-of-way?

A. Yes, sir.

Q. Is it accurate that Harmon Publishing has not been privy to these conversations?

A. That's correct.

Q. Is it accurate that Discovery Center has not been privy to these conversations?

A. Yes.

Q. And they are not privy because the City does not want to include them in the discussions?

MR. YURICK: Objection.

THE COURT: Who are the two you mentioned?

MR. MEZIBOV: Discovery Center and Harmon Publishing, Your Honor.

THE COURT: Why weren't they included? Overruled.

THE WITNESS: At this point in time, legally we were relying on the Solicitor's Office determining who should be in the right-of-way. We were simply meeting with the publishers that were deemed to be appropriate newsracks in the public right-of-way.

[p. 17] THE COURT: Let's get down to brass tacks. If Harmony (sic) and Discovery used the exact same newsrack as these others and they were painted in the same color or whatever you esthetically think is the appropriate color for the City of Cincinnati, would you have any objection to them?

THE WITNESS: From an esthetic standpoint, if all the boxes were the same, no; but I'm not speaking for the legal aspect -

THE COURT: I'm asking you. You're the person who makes the choice esthetically.

THE WITNESS: In terms of what it looks like, yes.

THE COURT: So if they use the same exact box or same appearing - how - why would the City object? You're the one - I guess you and the traffic engineer - objecting because it might be cluttering up the City. But cluttering up the City is not what's in the boxes.

THE WITNESS: If they are allowed to be there, I guess others were allowed to be there in terms of commercial handbills, of which the City Manager is involved in defining.

THE COURT: Is it the quantity of the boxes you're objecting to, or is it the appearance of the boxes? The newspaper boxes are perfectly all right but the other boxes are garish or something; you don't like the appearance of them?

THE WITNESS: At this point we're not objecting to quantity. Although, if boxes that are deemed -

[p. 18] THE COURT: If you're not objecting to the quantity and you're not and if the appearance all remains the same, what is the objection?

THE WITNESS: I think the objection is if the quantity could be an issue, if these -

THE COURT: It isn't an issue yet; is it?

THE WITNESS: Not with the ones we're working with.

THE COURT: And if it became an issue, how would you determine whose boxes would be there and whose wouldn't? Would it be based on the content?

THE WITNESS: At this time it is determined by the City Engineer working with the existing laws; that we not do not determine who goes there and who does not. We are simply involved in organizing what is there.

THE COURT: What we're trying to find out from your point of view, your position, is that if the boxes

are all identical in appearance, you aren't really heavy on color; are you?

THE WITNESS: We initially -

THE COURT: I think some of them have yellow -

THE WITNESS: We initially started out to have them all the same.

THE COURT: *The Enquirer* is yellow and *The Post* is red and *USA Today* is blue and white.

THE WITNESS: Right.

[p. 19] THE COURT: What other primary color is there? Red, yellow and blue.

THE WITNESS: That's pretty much all of them.

THE COURT: A lot of them in between?

THE WITNESS: Yeah.

THE COURT: If they are all the same size boxes, same in appearance substantially and they were in the colors of the rainbow, you wouldn't have any objection; would you?

THE WITNESS: With the exception of the fact if it's deemed that commercial handbills are legal, then there might be a lot of other ones out in the right-of-way; anything from Kroger bulletins to Pepsi -

THE COURT: There is nothing illegal about commercial handbills are there, in your view?

THE WITNESS: No, not within the framework of the law.

THE COURT: So from your point of view you have no objection to -

THE WITNESS: No.

THE COURT: - the boxes -

THE WITNESS: With the exception -

THE COURT: - as long as they are uniform in appearance. And even you don't have any objection because they have different colors?

THE WITNESS: No. But the issue being, if other ones [p. 20] are allowed that have advertising in them, the numbers could become a significant problem.

THE COURT: That becomes a different problem. That is not the question before the Court.

THE WITNESS: For the ones we're working with right now, I have no objection.

THE COURT: Including Discovery and Harmony (sic)?

THE WITNESS: It is not included in the group we're working with, oh, no.

THE COURT: That is what the case is about. What's wrong with Discovery and Harmony [sic] boxes?

THE WITNESS: We have not dealt with those at all based on this draft regulation. There is nothing wrong with them.

THE COURT: Okay.

Q. Mr. Richardson, you're certainly not aware that news boxes used by Harmon or by Discovery have

caused any problems on the right-of-way insofar as safety is concerned; are you?

A. No, I'm not, but they do - they have a different appearance than a lot of the other ones as we know them. No.

Q. And what your proposed regulation would seek to do is impose some uniformity on the style and appearance and size and shape of the various news boxes; is that correct?

A. Yes, sir.

Q. So if Harmon and Discovery Center would agree to utilize [p. 21] whatever news box the City deems to be an appropriate structure on the City right-of-way, that would obviate any problem you would have with Harmon's or Discovery Center's newsrack; would it not?

A. Yes, sir, with the exception of the number question could become an issue if many other ones are allowed to be there.

Q. Wouldn't numbers become a question if purely non-commercial publishers came in and, in droves, and wanted to put their papers in the public right-of-way?

A. Yes, it could.

Q. And wouldn't the City attempt to regulate the incursion of all the other non-commercial publications with regulations such as your proposed administrative regulation?

A. I suppose they would -

THE COURT: I guess what that question means is, it doesn't make any difference what's in those boxes; you just want to limit the number of boxes. And suppose a lot more newspapers around the country decided they wanted to sell in Cincinnati, how would you draw the line?

THE WITNESS: At this point we haven't. What we tried to do is limit the amount in a row in the space, for instance, the first light pole, so there is space to walk around. We have not limited the number.

THE COURT: Go ahead.

Q. And that is what you intend to do in the future with your [p. 22] proposed regulation; is that correct?

A. Yes, sir.

Q. To your knowledge, has Discovery or Harmon attempted to work with the City insofar as meeting whatever questions or problems the City has with regard to their newsrack?

A. Again, the Engineering Division deals with the permits directly. As far as I'm concerned, yes; but I don't have direct dealings with them.

Q. And it's accurate, is it not, Mr. Richardson, that whenever the City has had a problem with any particular newsrack because of its location, perhaps what the City would do would call up the publisher and ask that publisher to move that newsrack or adjust it in such a fashion to meet that complaint?

A. Yes, sir, but I think the City Engineer could speak to that better. They don't particularly have the

manpower to check every location, newspaper boxes in the whole city. But that is basically correct.

Q. That is how newsracks have been regulated in terms of a problem?

A. If there is a problem, they move it.

Q. You have already complied with the complaints?

A. The few, but I don't deal with that day to day.

THE COURT: Your colloquy here's to the effect the newsracks are really regulated by the City Engineer -

[p. 23] THE WITNESS: Yes.

THE COURT: - if somebody is not happy?

THE WITNESS: It is the technical resources of the City Engineer's office.

THE COURT: Thank you.

MR. MEZIBOV: Your Honor, that is all the questions I have of Mr. Richardson along with the introduction of his -

THE COURT: Do you have any redirect? Would you like to ask the witness on the matters that have been brought up on cross?

MR. YURICK: I think so.

THE COURT: Go ahead.

MR. YURICK: I would interpret - I guess it would be up to the Court to say whether or not their -

THE COURT: Go ahead with your questioning. It's all right. I don't I think it is fair for you to present

your case in Mr. Mezibov's case, but I'll permit you for the purpose of testing his testimony to examine him on redirect.

MR. YURICK: Okay.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Richardson, you testified that there were – there was no difference between the possible dangers posed by the Harmon and the Discovery Center boxes as opposed to ordinary news [p. 24] boxes or paper – or boxes which dispense newspapers; is that correct?

A. There is no difference in the nature – our office was not dealing with which paper was in the boxes. We were simply dealing with the type of dispenser. We do not deal with specifics of the type of dispenser of Harmon or Discovery with this process because they were not part of it. There is a difference if you want to physically look at the boxes. Certainly the Harmon Homes is plastic and the Discovery Center is a slightly different design, it's on a pedestal and slopes differently than the others and has, I think, the area where you reach your hand in or whatever sticks out to the right side differently than the others.

THE COURT: Is there any esthetic objection to the Discovery Center's boxes as contrasted or compared to those of the newspapers? You don't find any objection to those; do you?

THE WITNESS: Again, I never dealt with them individually. We just wanted Harmon's to use one particular box.

THE COURT: If they agree to use the same box, would you have any problem with that?

THE WITNESS: Not from the physical box standpoint, no.

THE COURT: That is all you're interested in?

THE WITNESS: That is all I deal with.

[p. 25] Q. Sir, but do these boxes, do all of these dispensing devices, do all of them pose esthetic problems?

A. Collectively, yes, they are all different.

THE COURT: Let me ask a question now. We're getting into another area. Is this a matter for the Court, as to whether difference is esthetically not good in this community as opposed to having everything the same?

MR. YURICK: Well, Your Honor, if the question is directed to me, I think Mr. Richardson is going to testify and the Court can make a finding that there are problems with all of these sorts of newspaper boxes.

THE COURT: Does the Building Department dictate that buildings have to all appear alike that appear in the city?

MR. YURICK: I think that there are architectural –

THE WITNESS: There's some safety issues. The main one being, they are attached to the City light poles

by chains and each one of the boxes having a different design is now attached in a slightly different manner and, of course, it's causing rust on the City light poles which is one of the main issues: to get the chains off the city light poles. By using a box of a similar design you can attach it to the City sidewalk and be in similar concept. If you have eleven or twelve different ones, you have to have a different concept for each different box.

THE COURT: There are some safety -

[p. 26] THE WITNESS: Right.

THE COURT: - architectural reasons, just not esthetics?

THE WITNESS: Right.

THE COURT: But if Discovery and Harmon, the plaintiffs in the case, used the same boxes as newspapers, that you would approve? You wouldn't have a problem with them; would you?

THE WITNESS: Presumably from an esthetic standpoint, no.

MR. YURICK: I would have no further questions. I would just like the right - to reserve the right to call Mr. Richardson in my case.

THE COURT: Yes.

MR. MEZIBOV: Your Honor, may I ask a couple of followup questions?

THE COURT: Go ahead.

MR. MEZIBOV: Your Honor, I would ask that Mr. Richardson be handed a package of photographs which is Exhibit 33.

(Clerk handing the exhibits to the witness.)

RECROSS-EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Richardson, I'm going to ask that you open that, please, and you should find a number of photographs. On the [p. 27] back would be the number of the particular photograph. And I'm going to ask you to find photograph No. 33D.

THE COURT: Let me ask this question. Is it the position of counsel that all the exhibits that are being identified should be admitted in evidence so we don't have to identify and offer?

MR. YURICK: Yes, Your Honor.

THE COURT: You have any objection to the Plaintiffs' Exhibits?

MR. YURICK: No, I have no objection.

THE COURT: Do you have any objection to the defendant's?

MR. MEZIBOV: No.

THE COURT: For the record, all the exhibits that are introduced are admitted, and when you get to an exhibit number, consider that's admitted.

(Plaintiffs' and Defendant's exhibits were admitted.)

Q. Mr. Richardson, do you have in front of you photograph No. 33D?

A. Yes, I do.

Q. I'm going to ask you what that particular photograph depicts?

A. It shows three newspaper boxes attached to a City mall pole which is a tripod pole with three separates [sic] poles making up the base. It is *The Enquirer, USA Today* and a *Business* [p. 28] *Courier*.

Q. Just so the record is clear, Harmon's news box is not in that photograph?

A. No.

Q. Discovery Center's news box is not in that photograph?

A. No.

Q. Earlier you indicated to Judge Spiegel the City was concerned about the manner in which certain news boxes were attached to light poles?

A. Yes, sir.

Q. And that that in some way posed a safety concern?

A. Yes.

Q. And it also posed, I suppose, an esthetic concern because of the rust that was built up on the poles?

A. Yes, sir.

Q. Is this an example of that type of problem?

A. Yes, it is.

Q. Then this is a problem that in no way involves either Discovery Center or Harmon's news boxes; does it?

A. It involves all the news boxes.

Q. Now I'm going to ask you to look at Exhibit 33F, please.

THE COURT: Can I take a look at that one you just looked at?

THE WITNESS: Sure.

THE COURT: Thank you, sir.

* * *

[p. 32] A. I suppose based on the administrative Regulation 38 it is currently allowed to be there. As far as our draft guidelines, no, it is not.

Q. Because it is too large?

A. It's much higher than the other boxes.

MR. MEZIBOV: That's all the questions I have, Your Honor.

THE COURT: Can I take a look at those, please?

MR. YURICK: Your Honor, just a couple questions.

THE COURT: Yes, certainly.

FURTHER REDIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Richardson, could you please take out picture number – or Exhibit 33B.

MR. MEZIBOV: B?

MR. YURICK: B as in boy.

THE COURT: Good for you. Phonetically. That is the only way I can get them straight.

A. I have got it.

Q. And can you describe what that depicts?

A. It is an older City light pole with a bus stop and an *Enquirer, Post* and a Discovery Center box attached to it next to a handicap ramp.

Q. And those are chained?

A. Chained to the pole, right.

[p. 33] Q. Does it appear there is rust in two spots where the chains are rubbing against the pole?

A. Yes.

Q. And 33C as in cat, could you describe what that depicts, please?

A. It's a newer City light pole with three boxes attached to it, one is *Harmon Homes*, one is *The Business Courier* and one is *The Post*, again attached by cable or chain.

Q. And I think it was your testimony earlier that these are part of the esthetic concerns of your office; that

these dispensers, when they are attached to poles like this, cause damage to the poles?

A. Yes, sir. They also, by being attached to the poles, are typically right next to the intersection which is another concern because they block the pedestrian circulation and flow of Downtown streets.

Q. And possibly visibility also?

A. Right.

MR. YURICK: No further questions at this time.

THE COURT: Let me take a look at those pictures, too.

THE WITNESS: Sure.

(The Court reviewing the photographs.)

THE COURT: All right. So your real concerns are the methods of attachment, that they can cause damage to the poles, [p. 34] the lack of uniformity, which really gets into the question of size, I presume, and the fact they may be blocking?

THE WITNESS: And the location of them.

THE COURT: The location.

THE WITNESS: They don't block safety and health issues and they don't block crosswalks.

THE COURT: Crosswalks.

THE WITNESS: And bus stops.

THE COURT: At intersections. And I guess the fourth one would be the quantity of them could create problems?

THE WITNESS: If too many -

THE COURT: There must be some way of regulating them. If the one newspaper is on this corner, there are four corners to every intersection -

THE WITNESS: Right.

THE COURT: - maybe someone wants the prime intersection but you can't get the northeast, you might have to take the southwest?

THE WITNESS: Yes.

THE COURT: So the quantity could be regulated and they could be of a uniform size or regulated. That would satisfy all your needs?

THE WITNESS: Yes, sir.

THE COURT: Okay. Thank you.

MR. MEZIBOV: Your Honor, I have one more question [p. 35] and one photograph just to clarify those last two questions.

THE COURT: Go ahead.

FURTHER RECROSS-EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Richardson, again I'm going to ask you to look at the photographs, this time 33G.

A. Yes.

Q. And could you tell us what that photograph depicts?

A. It's a photograph of six new boxes in a row. I think it's on 4th Street across from Gidding Jenny.

THE COURT: This is 33 -

MR. MEZIBOV: G.

THE WITNESS: G.

THE COURT: Okay.

A. Five of the same type, and *USA Today* is different.

Q. Now, this particular photograph depicts news boxes which have been lined up in a row so as not to require the chaining of any news box to a pole; is that correct?

A. Yes, sir, they are attached to the sidewalk by bolt.

Q. It would be correct to say this satisfies the City's concern with regard to safety and esthetics -

A. Yes, sir.

Q. - in answer to questions of news boxes being close to handicap ramps or tied to poles?

A. Yes, sir. This is set away from the intersection enough [p. 36] that it allows enough space to walk from the corner and is placed in a place that is not in front of a bus stop or a front door or loading zone.

Q. And is there any reason you know of why Discovery Center and Harmon's news boxes could not be similarly aligned?

A. In this particular case, the guidelines call for a maximum of six in a row which this happens to have; so

no matter which it would be, it shouldn't be in a row. But there may be a place down the street that would work out just as well.

Q. So in this photograph 33G, if *The Louisville Courier* wanted to place its news box there, it could not; is that correct?

A. Right.

Q. It would have to go to another location?

A. Right.

Q. And then the City, therefore, can control the number of news boxes at a given location?

A. At a given location, yes.

Q. Regardless of the contents of the information dispensed from the news boxes?

A. That's correct.

MR. MEZIBOV: That's all the questions I have, Your Honor.

MR. YURICK: I have no questions.

THE COURT: I'll take a look at that one, too. Thank [p. 37] you, Mr. Richardson.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Okay. You may call your next witness.

MR. MEZIBOV: If the Court please, we would call Tom Young as if on cross-examination.

THE CLERK: Will you raise your right hand?
(Duly sworn by the Clerk.)

THE COURT: Would you state your full name, please, and spell your last name for the court reporter?

THE WITNESS: Thomas E. Young; Y-o-u-n-g.

THE COURT: Have to keep your voice up so we can all hear you.

THE WITNESS: Yes, sir.

THOMAS E. YOUNG

a witness herein, having previously been sworn, was called as if upon cross-examination and testified as follows:

CROSS-EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Young, it's correct, is it not, that you are the City Engineer for the City of Cincinnati?

A. That's correct.

Q. And do I understand correctly that in your capacity as City Engineer you have some responsibility to receive and review and make recommendations with regard to applications for [p. 38] the use of newsracks on the City right-of-way?

A. That is correct.

THE COURT: And you use a microphone, too. Pull it around to the side, if you will. There is a place

there you can loosen it to raise it up. Receive, review and make recommendations as to locations; is that right?

THE WITNESS: Yes.

THE COURT: Who decides ultimately where a box goes?

THE WITNESS: My office does not make suggestions as to where the boxes should go. We review applications for placement.

THE COURT: And if somebody – if there are six there already, you would say, "No, you can't put it there?"

THE WITNESS: We would recommend against it, yes.

THE COURT: Who would you recommend to? Who makes the decision, the City Manager?

THE WITNESS: We are – my office is the designee under the City Manager form of Government.

THE COURT: So everything that all the subordinates do is recommendations and everything goes out under the City Manager or over the City Manager's signature?

THE WITNESS: No, sir. Our office issues or denies or revokes permits.

THE COURT: Okay. Then you would be granting or denying the permit?

[p. 39] THE WITNESS: But obviously we could be overruled by the City Manager.

THE COURT: Oh, sure.

Q. Now –

THE COURT: When you say you make recommendations, you actually are the one that grants or denies the permit?

THE WITNESS: That's correct.

Q. Mr. Young, prior to 1990, is it correct that your recommendations with regard to newsrack permits were governed by Amended Regulation 38 and applicable City code provisions; is that correct?

A. That's correct.

Q. And there were no other written guidelines which would assist you in utilizing either the regulations or the ordinances when you made your decisions to grant or revoke applications?

A. That's correct.

Q. Now, at some point in 1989 you received an application from Harmon Publishing; did you not?

A. Yes.

Q. I'm going to ask you to look at Exhibit 9, please, in the exhibit book.

THE COURT: Turn to Tab 9.

A. Yes, sir.

Q. Do you have that in front of you?

[p. 40] A. Yes, I do.

Q. This is a letter from you to Harmon Publishing; is it not?

A. Yes.

Q. Dated July 21st, 1989?

A. Yes.

Q. And at this point you indicated that you were granting permission to Harmon to place its publications in newsracks on the City right-of-way?

A. Yes.

Q. And you were familiar at that time, were you not, with the nature and character of the publication which Harmon proposed to distribute through newsracks?

A. Yes.

Q. And you felt that at that time there was no grounds to refuse them their request for newsrack permit; is that correct?

A. That's correct.

Q. I'm also going to ask you to turn to Exhibit Number 15.

THE COURT: Fifteen?

MR. MEZIBOV: Fifteen.

THE COURT: All right.

Q. You have that in front of you, Mr. Young?

A. Yes, I do.

Q. That's what purports to be a Request to Place Newspaper Vending Device in Public Right-of-Way; is it not?

A. That's correct.

[p. 41] Q. That is an official City form which accompanies the regulation Amended Regulation 38; is that correct?

A. That's right.

Q. In other words, if an individual is interested in receiving the City's permission to dispense a publication by means of a newsrack, that individual needs to make a request utilizing this form Exhibit 15; is that correct?

A. That's correct.

Q. And this particular Exhibit 15 reflects the request by the Discovery Center for City permission; is that correct?

A. That's correct.

Q. And this is dated February 17th, 1989?

A. Yes.

Q. And attached to it is a Certificate of Insurance; is that correct?

A. Yes.

Q. And that, too, is required by Amended Regulation 38. In order to receive a permit, you need to demonstrate to the City's satisfaction that you can indemnify and hold harmless the City with respect to any possible damages by - occasioned by means of a newsrack?

A. That's correct.

Q. And it's also correct that what needs to accompany this Request to Place Newspaper Vending Device is a site location and list of locations; is that correct?

[p. 42] A. Yes.

Q. And, in fact, you received all those from the Discovery Center on or about February of 1989; did you not?

A. Yes.

Q. And at the time you received that application and the accompanying materials pursuant to Amended Regulation 38, you had knowledge of the nature and character of the Discovery Center publication; did you not?

A. I did not personally process the application from Discovery Center.

Q. It was processed by Mr. Goldsmith; is that correct?

A. Yes.

Q. And he was your designee?

A. Yes.

Q. And he was issuing under your auspices and with your authority; is that correct?

A. That's correct.

Q. And you ultimately came to know that the Discovery Center had received permission to place -

A. Yes.

Q. - newsracks on the City right-of-way; is that correct?

A. Yes.

Q. And you also knew at this time or felt at this time that there was no grounds by which the Discovery Center could be denied this request?

[p. 43] A. I don't recall exactly what time I became aware of this particular permit and whether by that time the concerns had arisen regarding the Discovery Center.

THE COURT: But at the time that, I guess, the permit was granted, you knew of no reason to reject it?

THE WITNESS: That's right, although I was not aware it was processed at this time. It was processed by my designee.

THE COURT: But looking at the time it was granted - does it show on here when the permit was granted?

MR. MEZIBOV: February of '89, Your Honor.

THE WITNESS: Yes.

THE COURT: All right. And that seems to be the same date as the other one. Wasn't the other one February - the other was July of '89.

MR. MEZIBOV: July.

THE COURT: February of '89 was before July of '89 so you would probably have known of no reason at the time this was granted to reject it or you would have had it rejected?

THE WITNESS: That's correct.

Q. Mr. Young, in the ensuing months after Discovery Center received its permit on or about February of 1989, you did not become aware of any damage or injury claims attributed to Discovery Center's newsracks; did you?

A. No.

[p. 44] Q. Or any with regard to Harmon's newsracks?

A. No.

THE COURT: "No," what? I'm sorry; I didn't understand.

MR. MEZIBOV: "No," he did not receive any information or complaints concerning -

THE COURT: Oh, no complaints.

A. I question that, sir. You asked if there were damage -

Q. Yes, damage claims.

A. And I was not aware of any damage claims. There have been some complaints.

Q. You did receive a complaint, did you not, from an individual in Hyde Park concerning the placement of a Discovery Center newsrack?

A. Yes.

Q. And were you aware that that particular individual who voiced that complaint spoke with Ms. Moertl from the Discovery Center?

A. No, I wasn't.

Q. Were you aware that that complaint was satisfied?

A. It was satisfied because the complainant was advised that the orders had been issued to Discovery Center to remove all of the boxes at that time.

Q. Well, what was the complaint that was registered by the individual in Hyde Park; do you recall?

[p. 45] A. I don't recall in detail. I think the general concern was esthetics and the feeling that it obstructed access to the store.

Q. Well, in fact, she complained, did she not, that this particular newsrack was in front of her store or close to the entrance of her store?

A. I don't have the complaint in front of me, but that is my general recollection, yes.

Q. Let me show you, Mr. Young, a letter that was a [sic] addressed to you in April of 1990.

THE COURT: Do you have it marked, please?

MR. MEZIBOV: Should I have it marked?

THE COURT: Yes. Mark it first.

(Clerk marking the exhibit.)

Q. Mr. Young, let me show you what's now been marked as Plaintiffs' Exhibit 35. Is that the complaint about which you made reference?

A. Yes.

Q. And did you ever personally speak to the individual who registered that complaint?

A. No.

Q. What you did was write her a letter; did you not?

A. That's correct.

Q. And I believe that letter is maybe the next piece of paper over.

[p. 46] A. Yes, I have it.

Q. And that's a letter from you to whom?

A. To Ms. Susan Johnson, Store Manager of the Carriage Trade store in Hyde Park.

THE COURT: The what store?

THE WITNESS: The Carriage Trade store in the Hyde Park Square.

Q. And in that letter you inform Ms. Johnson that the problem with respect to the Discovery Center will be resolved because the City is ordering Discovery Center to take all its boxes from the City right-of-way?

A. That is correct.

Q. On the grounds that they constitute a commercial handbill?

A. That is correct.

Q. You never addressed specifically the nature of her objection which was the placement and location of the news box; is that correct?

A. No, I did not.

Q. And to this day are you aware of the placement of Discovery Center's newsrack as it affects the Carriage Trade store?

A. Not specifically, no.

Q. Do you know that the Discovery Center's newsracks are still out there on the right-of-way?

A. I understood some of [sic] had been removed, but we have not [p. 47] pursued the issue since the litigation in this case started.

Q. So you do not know of your own knowledge whether or not that complaint of Mrs. Johnson or that concern of Mrs. Johnson has been cured or satisfied?

A. No, I do not, other than by our letter.

Q. You never heard again from Mrs. Johnson; did you?

A. No.

Q. Is that the extent of any complaints you've heard registered with respect to either Discovery Center or Harmon?

A. That's the only one that I'm specifically aware of.

Q. And have you ever had any personal contact with Discovery Center or Harmon since the time that they applied for permits which would indicate to you that they, either Discovery or Harmon, was uncooperative in the City's interest in promoting esthetics and safety concerns?

A. No.

Q. Now it's accurate, is it not, Mr. Young, that in February, approximately February 1st, 1990, you received a memorandum from the City Manager, Mr. Johnson, as relates to newsracks?

A. That's correct. That's not the exact date, but in substance that's correct.

Q. Fine. I'm going to ask you to turn to Exhibit 2, if you would, please. Could you identify Exhibit 2 for us, please?

A. Exhibit 2 is a report from the City Manager to City Council in response to a motion from Council Member Mann. The [p. 48] substance of the report is that there are publications being placed in dispensing devices on the City right-of-way which violate the sections of the City code regarding non-commercial and commercial handbills.

Q. Now was any particular publication identified in this memorandum?

A. Not in this memorandum, no.

Q. Now I'm going to direct your attention to the final paragraph of this memorandum that paragraph which begins, "I am directing the Public Works Department" -

A. Yes.

Q. - is that correct? Mr. Johnson goes on to indicate that with regard to Administrative Regulation No. 38, approvals for newsrack permits should be limited to

daily or weekly publications primarily representing - or presenting coverage of, and commentary on, current events; is that correct?

A. That's correct.

Q. Is that the first time you had seen that language in any directive or written policy from anybody in the City?

A. Yes.

Q. And did that memorandum and that particular language cause you to take some action with regard to existing permits?

A. Yes, it did.

Q. What did you next do?

A. There were several publications being dispensed from boxes [p. 49] or devices on the street which we felt were commercial handbills under the provisions of the sections of the code that are involved, and included among them were Discovery Center and Harmon Publication's *Homes Magazine*. We wrote letters to them -

THE COURT: The three publications are Discovery Center, Harmony (sic) and Homes?

THE WITNESS: Harmon is the publisher of *Homes*.

THE COURT: Yes. Discovery Center, *Homes*. That was it?

THE WITNESS: No, Christians Singles publication.

THE COURT: What was that?

THE WITNESS: Christian Singles publication.

THE COURT: Discovery, Harmony (sic). What does that cover, Christian Singles?

THE WITNESS: Christian Singles is actually two magazines: one oriented to, I believe, Protestant and one oriented to Catholic readers which has personal notices for companionship.

THE COURT: That's considered commercial. Do you consider that commercial?

THE WITNESS: We did, yes.

THE COURT: Commercial handbills?

THE WITNESS: Uh-huh; they're advertising.

THE COURT: You think you'd probably get some debate [p. 50] on that?

(Laughter.)

THE COURT: Okay. Those are the three.

THE WITNESS: I have to put it this way, Your Honor: we didn't consider it news.

THE COURT: Okay.

Q. Now you indicated that "We" considered these publications to be in violation of City ordinance; is that correct?

A. Yes.

Q. And would you tell the Court who is included in the term "We?"

A. My staff with -- concurrent with representatives of the City Solicitor's Office.

Q. Were you told at the time you received the memorandum from Mr. Johnson that the City considered Discovery's publication and Harmon's publication to be in violation of City code?

A. No. We concluded that based on our own review of the publications.

Q. And did you consider those publications in light of City ordinance 714-1-C which defines a commercial handbill?

A. Yes.

Q. Is that what makes those publications in violation of City code, the fact they would constitute commercial handbills?

A. Yes.

Q. You're familiar with the terms of that City ordinance; are [p. 51] you not?

A. Generally. I would have to look at the exact wording.

THE COURT: What is that ordinance again?

MR. MEZIBOV: 714-1-C, Your Honor.

THE COURT: Okay.

Q. Let me read that to you.

THE COURT: In the exhibit book here?

MR. MEZIBOV: It's not in the exhibit book. It's in some of the memoranda.

THE COURT: All right.

Q. " 'Commercial handbill' shall mean any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

(a) which advertises for sale any merchandise, product, commodity or thing."

Is that what in your opinion Discovery Center and Harmon's publications do?

A. I believe there are several other subsections.

Q. Well, would you believe that Discovery Center and Harmon are in violation of that particular provision?

A. I believe they advertise in the one case a thing, a home or homes, and in the other case a service.

Q. Have you ever looked at *The Cincinnati Enquirer* or *The Cincinnati Post*?

[p. 52] A. Yes.

Q. Do you believe that either of those publications advertises for any sale of merchandise, product, commodity or thing?

THE COURT: Let me ask. Does this ordinance have a provision relating to the quantity in relation to news?

MR. MEZIBOV: No, the ordinance does not, no.

THE COURT: Is there a copy of the ordinance? I would like to look at the ordinance. It seems to me that is

what what [sic] we're talking about. Maybe you could make a Xerox.

MR. YURICK: Your Honor, it is cited in my trial brief and I have an extra copy of that.

THE COURT: You have an extra copy?

MR. YURICK: Yes.

THE COURT: You don't mind, do you, Mr. Mezibov?

MR. MEZIBOV: Not at all, Your Honor.

THE COURT: Thank you. I would like to take a look at it.

(Document being handed to the Court.)

THE COURT: Thank you.

(The Court reading the document.)

THE COURT: Well, now it's obvious that every newspaper in town contains all these things. Have you got a copy of the ordinance in front of you?

THE WITNESS: No.

[p. 53] THE COURT: Every newspaper in town advertises for service or commodity; doesn't it?

THE WITNESS: Yes.

THE COURT: Does every newspaper direct attention to any business or merchantile [sic] or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting its interest? Newspapers do that; don't they?

THE WITNESS: Yes.

THE COURT: Every newspaper?

THE WITNESS: Yes. However, there are - newspapers are identified in the sections of the code.

THE COURT: Let me get to that in a minute. I'm trying to cut through some of this. And "... directs attention to or advertises any meeting, theatrical performance." Newspapers do that, too. And then they say, "Non-commercial handbills are defined as follows:

'Non-commercial handbills' shall mean printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, newspaper, magazine, paper, booklet or any other printed or otherwise reproduced originals or copies of any matter of literature not included in the aforementioned definitions of a commercial handbill."

So it sounds to me the newspaper is included in both definitions; isn't it? Just because - did you write this?

[p. 54] THE WITNESS: No, sir. No, Your Honor, I did not.

THE COURT: I have a little difficulty with this, Mr. Solicitor. This is not your draftsmanship; is it?

MR. YURICK: No, Your Honor.

THE COURT: You say something - you say something is a commercial handbill that includes a lot of things which something else includes, and then you say the something else is not a handbill because it's called something else, but it includes the same thing that the first one does. Don't you find that a little confusing?

MR. YURICK: I think taken by itself it is confusing, but there are other provisions of the code which I think make it more clear. For instance, Section 862-1, which is also again cited in my brief, grants permission for people to engage in the business of selling newspapers and for newspapers to occupy space on the sidewalks and city streets. Then again Section 911-17, Cincinnati Municipal Code, states: "Newspapers of general circulation in the City of Cincinnati may be sold from racks, containers and bags attached to poles and other structures on city sidewalks," et cetera, et cetera. And regulation -

THE COURT: But a newspaper can be a commercial handbill because it contains all the materials that are included in the definition of a commercial handbill.

MR. YURICK: But the City of Cincinnati, and there [p. 55] will be testimony -

THE COURT: The practice is opposed to what the ordinance says.

MR. YURICK: - from Mr. Young, yes, that the practice of the City is a longstanding practice to allow newspapers to be dispensed from newsracks.

THE COURT: I understand; but remember we have some constitutional problems here. Mr. Young, let me ask you a question. If the - you're not interested in the content of what's in the publications, are you, from your view? You're only interested in public safety and public works; are you not? I asked the same question of Mr. Richardson. I am asking you a somewhat similar question. If Harmony and Discovery and these others -

Christian Singles – use the same kind of box or rack and was mounted in a fashion that satisfied the safety and considerations that Mister – particularly Mr. Richardson was concerned about – blocking access to intersections or bus stops or access for handicapped people at the intersections and the quantity could be regulated; it wasn't just too crowded with these boxes – that would satisfy your need as a Director of Public Works; wouldn't it? You're not interested in the content. What I'm trying to distinguish, safety has nothing to do with content; does it?

THE WITNESS: Your Honor, my primary responsibility [p. 56] is safety and convenience of the public. However, it has been our position, and we felt supported by the code, that predominantly advertising – and there is a difference, we felt, and in consultation with the Law Department, between newspapers as we commonly know them – *The Enquirer*, *The Post*, *The New York Times* – between those publications which have a great deal of current news editorial content, opinion, public information, as well as the substantial amount of advertising. But they do have those other parts that are content. The Discovery Center and Homes magazine we felt do not have that type of information included in them.

THE COURT: Doesn't that get into the real problem we have here, that you're deciding whether somebody has access to the public thoroughfare because of the content of what they are saying?

THE WITNESS: Because it is a commercial publication rather than a newspaper as –

THE COURT: Well, a newspaper is a profit-making operation. What makes a newspaper go is not the money that they get for each copy that they sell; it is the money they get from their advertisers, is it not?

THE WITNESS: We understand that.

THE COURT: And so it's a business operation for them as well as for the others. How do you distinguish? Or is it fair to distinguish under the Constitution?

[p. 57] THE WITNESS: Your Honor, that –

THE COURT: That is my problem, I guess.

THE WITNESS: That is the issue of this case.

THE COURT: I agree with you it is the issue of the case. What I'm trying to distinguish between –

THE WITNESS: We felt under the terms of the Municipal Code that there is a clear differentiation between the types of publications involved and that the –

THE COURT: It is better for the citizens to have the newspapers in the boxes and not commercial material; is that correct?

THE WITNESS: Not commercial material on public property.

THE COURT: All right. But suppose the commercial materials in the newspapers are in the same kind of boxes, that you had no safety concerns and no quantity concerns and no access concerns: is it any business of the City then to be concerned about what's in those boxes that you're permitting to be sold from them?

THE WITNESS: Your Honor, I continue to have a concern about publications that are almost entirely or entirely commercial in nature. I recognize that there is a difference or that there is commercial material in any of the publications that we all recognize as newspapers. But I have - I personally feel there is a difference. And in general, [p. 58] advertising is not permitted on public property and in that sense we felt this was a consistent decision.

THE COURT: All right. Thank you.

MR. MEZIBOV: Your Honor, I just have a couple more questions.

THE COURT: I appreciate you standing by your guns, too. Last time Mr. Young and I confronted each other, I guess, was 20 years ago in the Pogue's Garage case -

THE WITNESS: Oh, okay.

THE COURT: - in this courtroom. Go ahead.

Q. Mr. Young, again directing your attention to the Johnson memorandum which is Exhibit 2, that is dated February 7th, 1990, in which Mr. Johnson directs you to apply Administrative Regulation No. 38 to daily or weekly publications primarily presenting coverage of, and commentary on, current events. It's accurate, is it not, Mr. Young, that you make a determination of what the term "primarily" means?

A. Yes.

Q. Mr. Johnson didn't tell you what that means; did he?

A. No, except the wording in this report which says, "... daily or weekly publications primarily presenting coverage of, and commentary on, current events."

Q. And you have adopted a 50 percent test in order to apply this directive; have you not? In other words, if a particular publication constitutes 50 percent or more coverage of, and [p. 59] commentary on, current events, then it passes muster under the scheme?

A. We have not formally adopted any numerical guideline. This does not appear to be something that can be put into a computer and pulled out. In my deposition, I think I stated that a 50 percent news versus commercial material might be a possible guideline or a borderline situation as compared with publications which are almost entirely commercial in nature and as compared with the publications that we all recognize as newspapers.

Q. I don't mean to belabor this point. I'll make reference to your deposition at Page 12. Do you recall that I asked you this question: "How do you interpret and apply the wording 'primarily presenting coverage of?' What does 'primarily' mean?" And do you recall your answer on that date as being: "I suppose it's a fairly general term. But I think most people would interpret it, and I think we would interpret, as being at least 50 percent."

A. I don't think that is inconsistent, sir, with what I said.

Q. I wasn't suggesting it was inconsistent. I wanted the record to be clear. Then I understand then, or should

we understand then, that if a particular publication consisted of 40 percent articles and editorial content and 60 percent [p. 60] advertising, that that particular publication would be banned from the city streets?

A. I think each case would have to be reviewed individually and I'm not sure I can answer that -

THE COURT: I think the upshot of this is, you have been delegated by the City Manager or City Council, or however it works, the responsibility of determining which publications pass muster?

THE WITNESS: That's correct.

THE COURT: And that becomes a question of whether this kind of a statute permits that kind of delegation of authority. That is my authority not Mr. Young's problem.

Q. There is no question, Mr. Young, is there, that this memorandum and directive from Mr. Johnson dated February 7th, 1990, has never been enacted into the City code? Has it not, or has it?

A. We believe it's in the code in the provisions of Section 714, the two sections which describe commercial and non-commercial handbills. Now the definition of or the guideline of "... daily or weekly publications primarily presenting coverage of, and commentary on, current events" has not been enacted into any section of the code.

Q. So you again - so I understand, you are interpreting 714-1-C of the Cincinnati Municipal Code in light of this memorandum dated February 7th, 1990; is that correct?

[p. 61] A. That is correct.

THE COURT: Am I correct, counsel, that 714-1-C and 714-1-N's the only two which get into the definition of what is a commercial handbill and a non-commercial handbill?

MR. YURICK: Those are the sections of the code.

THE COURT: Am I also correct that the commercial handbill definition includes these three things which: "... advertise for sale, which direct attention to; (B) which directs attention to any business or mercantile or commercial establishment; (C) which directs attention to or advertises theatrical performance" and so forth? Those are commercial handbills. And the only other definition of a non-commercial handbill is that it, "... shall mean printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, newspaper, magazine, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature not included in the aforementioned definitions of a commercial handbill?"

MR. YURICK: In the code, that's correct. But then again I also think, as I mentioned earlier -

THE COURT: I don't want to know what you think right at this point. I'm just trying to make sure this is what I have to go on.

MR. YURICK: Those are the two sections that define [p. 62] what a commercial handbill is and a non-

commercial handbill is. But I think there are other sections of the code that make it clear that a newspaper is not considered a commercial handbill.

THE COURT: Well, you will have that opportunity. Thank you.

MR. YURICK: Thank you.

THE COURT: Anything else of Mr. Young?

MR. MEZIBOV: One other question, Your Honor.

Q. Mr. Young, are you aware of any provisions in the Cincinnati Municipal Code which I can find a definition of the term "newspaper?"

A. Not specifically, no.

MR. MEZIBOV: That's all the questions I have for Mr. Young. Thank you.

THE COURT: You may redirect.

MR. YURICK: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Young, Regulation 38 that applies, you stated that you gave both Harmon and the Discovery Center - I'm sorry, you have said Mr. Goldsmith granted a Request to Place Newspaper Dispensing Device to Discovery Center, and you, yourself, granted permission to Harmon under Regulation 38; is that correct?

A. That's -

[p. 63] Q. Following Regulation 38; is that correct?

A. That's correct.

Q. But Regulation 38, by its own terms, applies only to newspapers of general circulation; isn't that also true?

A. That's correct.

Q. Okay. In hindsight, would you have granted either one of these publications permission to be on the public right-of-way knowing what you know now back then? I am asking you - I know hindsight is always 20/20, but would you have granted them permission?

MR. MEZIBOV: There is an objection, Your Honor; form of the question.

THE COURT: Yeah. I think you'd better rephrase the question. I'm not sure we're concerned with that. It was done and somebody complained and then the wheels started to turn. But up to that point in time there was no problem; is that correct?

THE WITNESS: That's correct.

THE COURT: Now the wheels are turning and we're trying to figure out whether there is a problem or not. And what I'm trying to find out or not, what's the term under the Constitution which permits you to do these things, public health, safety -

THE WITNESS: And convenience.

THE COURT: Please?

[p. 64] THE WITNESS: Public health, safety and convenience.

THE COURT: We're interested in the safety and convenience. We are not concerned with the health.

THE WITNESS: No.

THE COURT: And the safety has to do with the danger of the pedestrians blocking the sidewalks, the crosswalks and intersections and things like that, as well as whether chaining them to metal poles would cause rust which would cause damage to the poles and expense to the City, and "convenience" could be because of their height they may block view. So the convenience and safety issue could be satisfied by maybe developing an ordinance which would require more uniformity in appearance and quantity which could be located at any one location without getting into the content of these boxes. Is that a fair way of analyzing it?

THE WITNESS: I would - could not disagree with that, sir.

THE COURT: My problem is, that nothing happened with it. It didn't seem to be a problem until somebody complained, and then the complaint was with regard to safety and convenience, and the decision to cause them to be removed didn't seem to have anything to do with the content of what was being said.

THE WITNESS: It had to do with the proliferation of the device. These two publications were the first permits to [p. 65] be requested.

THE COURT: So this gets into the quantity issue.

THE WITNESS: To some extent, yes.

THE COURT: I see.

THE WITNESS: Those were the first two to be requested that were not clearly in the general understanding of newspapers.

THE COURT: Okay. Thank you.

Q. Before you asked Harmon and Discovery Center to move their boxes, you sent them a letter, is that correct, for George Rowe's signature?

A. The letter which was sent to them directed them to remove their boxes by a certain date but also advised them that there was an appeal procedure.

Q. And that appeal provided for administrative hearing; is that correct?

A. Yes, that's correct.

Q. Were such hearings held for both Harmon and Discovery Center?

A. Yes, there were.

Q. And to this date has your office or anybody to your knowledge interfered with either Harmon or Discovery Center's boxes or dispensing devices?

A. No, we have not.

MR. YURICK: I have no further questions of this

. . .

[p. 68] MR. YURICK: I object. I think the witness is trying to answer the question.

THE COURT: Well, do you have any – I think the letter was identified.

MR. MEZIBOV: Yeah. We'll –

A. I don't – that may very well be true. It probably is true. However, the letter was written by my office for the signature of the Director of Public Works and he was not personally involved in the original decision.

Q. Well, I'm going to ask you to look at Exhibit 16, please. Do you have 16 in front of you?

A. Yes, I do.

Q. And that purports to be a letter over the signature of George Rowe, Director of Public Works, to Margaret Moertl, dated March 8th, 1990; is that correct?

A. Yes.

Q. And by this letter the City advised Mrs. Moertl that her publication or Discovery Center's publication constituted a commercial handbill and that Discovery Center needed to remove its news boxes from the City right-of-way; isn't that correct?

A. That's correct.

Q. And did you instruct Mr. Rowe to send this letter?

A. I sent it to him with my initials which constitute a recommendation that it be sent.

Q. And Mr. Rowe, therefore, was the appropriate person to [p. 69] issue the city directive in this particular regard; is that correct?

A. Yes, but again he did not personally participate in the decision.

Q. He was relying on your advice; is that correct?

A. That's correct.

Q. And then was he relying on your advice at the appeals hearing at which he sat when Mrs. Moertl came to plead her case?

MR. YURICK: I'll object to the question.

THE COURT: Overruled. Go ahead. You may answer.

A. No, he was not at the appeal hearing. He heard Mrs. Moertl make a very spirited and thoughtful presentation of her case and he then voted as he saw fit based on the issues.

Q. Mrs. Moertl's presentation was either not spirited or thoughtful enough; in any case, it was rejected, is that correct?

A. That's correct.

Q. And I see copied on this letter of March 8th was Mr. Ganulin from the Law Department; is that correct?

A. Yes.

Q. And he participated in the decision-making process which resulted in this particular letter being sent out on March 8th; is that correct?

A. I honestly don't recall whether he personally participated [p. 70] in the decision or not. He certainly was involved in earlier discussions as to what constituted

a non-commercial handbill and a commercial handbill. I honestly don't recall whether he participated specifically in a review of Discovery Center or Harmon Publications' *Homes Magazine*.

Q. Let me ask you this, Mr. Young: You have indicated that three of you sat as the Sidewalk Appeals Committee; is that correct?

A. Sidewalk Appeals Board.

Q. Appeals Board. And as I understand it from your responses earlier to Mr. Yurick, the purpose of the existence of the Sidewalk Appeals Committee is to deal with matters which affect the physical appearance and safety of public sidewalks; is that correct?

A. Yes.

Q. The Sidewalks Appeal Committee was never constituted nor was its purpose ever defined as a board by which to make determinations of what constitutes commercial as opposed to non-commercial expression; was it?

A. Not specifically; but it was constituted to deal with sidewalk safety and we felt this was - it was felt this was in the overall area of responsibility of the Sidewalk Board of Appeals.

Q. Again just so the record is accurate, Harmon and Discovery Center were not required to take their news boxes off the City [p. 71] right-of-way because they presented a safety problem or esthetics problem; isn't that correct?

A. Specifically, no. In general terms, the issue of proliferation of dispensing devices can be a safety issue and is a safety issue in some areas, and it was felt that devices - that publications which are not authorized by the Cincinnati Municipal Code's provisions would be an appropriate start in dealing with the issue of proliferation and safety as they affect safety.

Q. What was it, Mr. Young, that Mrs. Moertl and Harmon needed to convince the Sidewalk Appeals Committee in order to keep their news box on the street? Did they have to convince that committee that other publishers would not place boxes out on the street so that the City would be allayed concerning possible proliferation? Was that the purpose they had to meet at that hearing?

A. The burden that they had to meet at the hearing was to show that they were a non-producing - producing a non-commercial handbill as opposed to a commercial.

Q. And what standards did they have to meet to meet that test?

A. The basic guidelines were those in the City Manager's report of February 7, 1990. What is the exhibit number?

Q. That's Exhibit 3.

A. No -

[p. 72] Q. I'm sorry; number -

THE COURT: Two.

Q. Number 2.

A. Number 2, ". . . primarily presenting coverage of, and commentary on, current events," daily and weekly publication - daily or weekly publication.

Q. And it's correct, is it not, Mr. Young, the first time my clients were ever advised of this particular directive or clarification or standard was in your letter advising them they needed to remove their newsracks?

A. That's correct, yes.

Q. And the City never passed this guideline, February 7th, 1990, into law; did they?

A. No, the report was approved by City Council but that does not make it a law.

Q. So, the only way my clients would have known this was the new view of Amended Regulation 38 is because you told them that at the appeals hearing; is that correct?

A. No, that's not correct. They were told that in their letter, I believe, in the letter ordering them to remove. And since they had not been previously notified, the appeal process was provided.

THE COURT: Let me ask this question. When a person gets a permit from the City, what does the permit permit them to do and for how long?

[p. 73] THE WITNESS: Under the Amended Regulation 38, it permits them to place dispensing devices at locations which they list by location or provide a site plan for a period of one year. To retain the permit once issued, they have to resubmit that list on an annual basis.

THE COURT: Everybody resubmits every year, gets a new permit every year?

THE WITNESS: Yes.

THE COURT: Is there a license fee that goes along with it?

THE WITNESS: No, there is not.

THE COURT: Is not.

Q. You have indicated, Mr. Young, you have been concerned with proliferation of these newsracks on the City right-of-way. Are you familiar with how many newsracks are currently on the public right-of-way?

A. In precise numbers, no. Order of magnitude, probably yes. It's probably in the neighborhood of 1500 to 2000.

Q. And, out of those 1500 to 2 - 1500 to 2000, approximately 50 to 60 of those belong to Discovery Center and Harmon; is that correct?

A. I don't recall the numbers precisely, but I'll accept your figures.

MR. MEZIBOV: That's all I have, Your Honor. Thank you.

[p. 74] THE COURT: You were formerly Traffic Engineer; were you not?

THE WITNESS: Yes, I was, sir.

THE COURT: In that role, were you concerned about the number of taxicabs in Cincinnati or proliferation of the number of taxicabs in Cincinnati? Let me ask

you this as an old hand at City Hall: How do they handle the licensing of – of the City licensed taxicabs? I know in other cities they have to have a medallion and there is a number, there is a finite number of taxicabs that are permitted in the city. Is there a similar situation here?

THE WITNESS: There was at one time, I believe. Essentially, the cap on the number has been essentially removed.

THE COURT: See, I have to decide this on what is the least restrictive method of accomplishing the concerns that you have, which includes public safety and convenience which also includes proliferation; and if that can be accomplished without infringing on anybody's First Amendment rights, that would be the best way to do it, and that's what's running through my mind. So I think counsel should be aware of that, too. We thank you, Mr. Young, for your testimony.

* * *

MARGARET MOERTL

[p. 77] A. I put together the program, arrange new activities. I'm responsible for distribution of the magazine. And I administer the local office, I'm in charge of facilities; every aspect of running the business in Cincinnati.

Q. Could you tell us the history of Discovery Center here in Cincinnati, when it first came and how it developed?

A. Yes. We began in 1982 here in Cincinnati. There are independent learning programs similar to ours in

many cities around the country and we saw that Cincinnati was a good city that had a lot to offer and that would support a program like this.

Q. Now, does the Discovery Center promote its program and activities by means of a magazine?

A. Yes.

THE COURT: By means of what?

MR. MEZIBOV: A magazine.

A. Yes; that is, we have tested various other ways to advertise our programs, and what seems to benefit the students and the people who present the programs through us the best is by producing our own magazine and distributing that.

Q. Ms. Moertl, I'm going to ask that you be handed a copy of Exhibit No. 24.

MR. MEZIBOV: (To the Clerk) That may be one of the separate items. Yeah. (Clerk complying.)

[p. 78] THE WITNESS: Thank you.

MR. MEZIBOV: Thank you, Ms. Schaeffer.

Q. Do you have in front of you now, Ms. Moertl, what's been marked Exhibit No. 24?

A. Yes, I do.

Q. And could you identify that for us, please?

A. This is the May/June issue of Discovery Center Magazine.

Q. How often is that particular publication put together?

A. We publish nine times a year, approximately every nine weeks I'm sorry, every six weeks. I'm sorry.

Q. And is there a charge for that magazine?

A. No. We feel it is inherent in the nature of our operation that the publication be free to the general public.

Q. Could you tell us, Ms. Moertl, what information is intended to be conveyed through and by means of that particular publication?

A. We offer descriptions of the various programs and courses that are offered by the individuals and organizations who work with us, and we provide information on what's hot in Cincinnati through those listings and other things.

THE COURT: What do you mean by, "Hot in Cincinnati?"

THE WITNESS: "Hot in Cincinnati," we try to offer classes in programs through Discovery Center.

THE COURT: "Hot in Cincinnati" relating to programs, classes, theater or whatever?

[p. 79] THE WITNESS: All of the above, Your Honor. For example, we work with the Cincinnati Ballet to present An Evening at the Ballet. The Ballet uses it as an opportunity to attract new people, new patrons to the ballet, and they have been very pleased with the result.

Q. How does the Cincinnati Ballet - how does -

A. Excuse me. Go ahead.

Q. Could you describe more fully how the Cincinnati Ballet would use your magazine and your program to promote its purposes?

A. Yes. They work with us to develop a specific evening event; in this case, it's an opening - it's always opening night and it includes a backstage tour and post-performance reception with the dancers and the artistic director of the ballet, and we arrange to - we put that in our magazine at no cost to the Ballet and then we share, if it's successful, whatever, we share in the fees that come in to Discovery Center from - for that event and we handle the registration and so on and we tell the Ballet how many people to expect and how many tickets to issue and so on and they take it from there.

Q. Who are your intended readers?

A. Everyone in Cincinnati. We think it's important to keep learning new things all through your life, so we try to get everybody in the Tri-state. Do you mean specific demographics?

Q. Yes. And who are the people you intend to reach or try to [p. 80] reach through this -

A. All right. Well, adults, the average age of our students is about 35, and it's primarily - well, it's more women than men, some more single people than married although that is pretty close. That is more or less the demographics. We find Downtown workers, visitors to the city, as well as residents in the outlying areas are all potential students for programs offered through Discovery Center.

Q. Have any organizations or companies used your magazines for their purposes other than to sell your classes, for example?

A. Yes, there have been several instances of that. One, for example, is when Chiquita moved several hundreds of its employees into the area from the New York area, they faced an attitudinal behavior. Some of the people moving from New York were concerned they were moving to a small town where there wasn't much going on, and so we provided the relocation people who were working with Chiquita, provided them with lots of our magazines, and for several months before the transferees actually moved into this area to help overcome that block and to help them understand Cincinnati is a vibrant and vital place and there are lots of things going on.

Q. Now prior to 1989, how did you distribute your particular magazine?

A. We distributed, prior to 1989, we distributed our magazine [p. 81] to our students who have taken classes through us before and to people who called and asked to receive our magazine and where we could through various retail outlets, bars and restaurants and so on where the manager would permit us to put a small rack on a cigarette machine or something. We've tried also other kinds of distribution.

Q. And in about 1989 did you make a decision to attempt to distribute your magazine by a new means?

A. Yes, we determined that newsstand boxes would be an effective way for us to serve the public in Greater Cincinnati.

Q. Now, I'm going to ask you to look at the book of exhibits and particularly turn to Trial Exhibit No. 15, if you would, please.

A. Yes.

Q. Can you identify that for us, please?

A. That was our Request to Place Newspaper Vending Device in Public Right-of-Way and that was the request that was attached to Regulation 38.

Q. And did you, yourself, participate in this application process?

A. I did the application myself.

Q. And did you have any conversations with any City officials before you submitted that application?

A. Yes, I called first the Mayor's Office and inquired about whether or not we might be able to put our magazine on City [p. 82] streets and was directed to Ralph Goldsmith in the Public Works Office or Engineering Office. I guess Public Works Office. And Mr. Goldsmith told me he was not aware there would be any problem and sent me the appropriate copy of Amended Regulation 38 and forms and so on.

Q. Okay. When you say, "Amended Regulation 38," are you referring to that which has been marked as trial Exhibit No. 1?

A. I am.

Q. And were you referred to any other particular City ordinance or City regulation which would assist you

or educate you with regard to your application for newsrack permit?

A. I was not.

Q. Were you led to believe by anything Mr. Goldsmith said or advised you or referred you to that you would have difficulty receiving a City permit?

A. No; in fact, we consulted with the City before we purchased the boxes, because as a small company, this was a big expense for us.

Q. Did your company own news boxes before this time?

A. No, we did not.

Q. And what was your purpose then in consulting with the City before you purchased these news boxes?

A. To make sure we would be able to use them if we purchased them.

Q. And -

[p. 83] A. And we were led to believe that would be the case and, in fact, subsequently we were granted that permission.

Q. Do you recall either the names or the titles of those officials with the City with whom you spoke concerning newsracks?

A. I believe I spoke exclusively with Mr. Goldsmith.

Q. And following your conversations with Mr. Goldsmith, did your company purchase these racks?

A. Yes, we did.

Q. And could you recall approximately how many you did purchase?

A. We purchased about fifty.

Q. And did you utilize all fifty in the City?

A. Not all of them are in the City. The majority of them are in the City. The majority of them are Downtown. We have about 38 of them in the Downtown area.

Q. Is that how many newsracks you now have placed on the city right-of-way?

A. The City total we have closer to 45.

Q. And that was all pursuant to approval of your application which is Exhibit 15?

A. That's correct, and that would be February of 1989, about a year-and-a-half ago.

Q. At what cost did you purchase these newsracks, approximately?

[p. 84] A. Approximately it was in the ballpark of about \$7,000, something like that. We bought them used.

Q. Were you given any guidelines from the City or anyone else as to the type of newsrack you needed to purchase or its appearance?

MR. YURICK: I'll object to that question as to what anyone else - what guideline she received from anyone else.

THE COURT: Yeah.

MR. MEZIBOV: I'll limit that to the City.

THE COURT: Rephrase your question.

Q. Did the City give you any guidelines or requirements with regard to the physical appearance or configuration of the news boxes?

A. The only guidelines I received were those contained in Amended Regulation 38.

Q. Did you provide to Mr. Goldsmith a copy of your magazine -

A. Yes, I did.

Q. - at or prior to the time you presented your application?

A. I don't recall whether it was at or prior to the time, but I did submit and he, in fact, as I recall, was somewhat familiar with the publication, I guess.

Q. There was no question that the publication you ultimately distributed on the City right-of-way was the same publication -

[p. 85] A. There is no question it's -

Q. in force at the time you made your application?

A. Yes.

Q. I'm going to ask you to look at the packet of photographs which are Exhibit Numbers 33. (Clerk handing the exhibit to the witness.)

Q. And more particularly, Ms. Moertl, I'm going to ask you to look at Exhibit 33. Look on the the back. There should be one marked 33.

A. Thirty-three even?

Q. Just 33 even.

A. I have that photograph.

Q. And can you tell us what that particular photograph depicts?

A. It depicts *The Cincinnati Business Record*, *The Wall Street Journal*, and the Discovery Center Magazine boxes in a line on a City sidewalk.

Q. Now with reference specifically to the Discovery Center newsrack, is this an example of the newsracks which Discovery Center purchased for placement on the City's right-of-way?

A. It is.

Q. Is this the identical newsrack which is utilized in the various locations throughout the City?

A. It is. There is some difference. We have most of them on the pedestal stands and some of them on the four-legged stands, [p. 86] but essentially it's the same box itself.

Q. Prior to placing any newsracks belonging to the Discovery Center on the right-of-way, had Discovery Center received from the City permission to place that newsrack at that particular location?

A. Yes.

Q. In other words, all of the locations had been preapproved by the City; is that correct?

A. Presumably. There were no objections as long as - in accordance with the Regulation No. 38, we submitted our location list and so on, and that was all approved.

Q. And you placed all your newsracks -

A. Where we said we were going to put them.

Q. In conformance with the site locations you had provided?

A. That's correct.

Q. Were you told how to anchor or to affix these newsracks at any given site?

A. No, we followed the norm, which were chains.

Q. Have you ever received any complaint or any question about the manner in which any particular Discovery Center newsrack was placed or mounted?

A. We received directly - the woman from the Carriage Trade, who was described earlier, contacted us directly. Also, there had been earlier, when we first put the boxes out, another merchant Downtown who had contacted us because he didn't like [p. 87] having a rack in front of his business and we moved it within 24 hours.

Q. Did you do that also in the Hyde Park location?

A. Yes.

Q. Was that resolved to everyone's satisfaction to the best of your knowledge?

A. Yes.

Q. Did anyone from the City ever advise you that your newsracks presented a problem from the esthetic standpoint, that they would not be approved?

A. No.

Q. Were you told that there was particular guidelines or requirements which you needed to follow with regard to the physical appearance of your newsracks?

A. No.

Q. And you also provided, did you not, comprehensive liability insurance with your application?

A. I did.

Q. And you have maintained that in full force, have you not -

A. We have.

Q. - since that time?

A. Yes.

Q. Now did there come a time, Ms. Moertl, when you were advised by the City that your newsracks were in violation of [p. 88] the City code?

A. Yes, in a letter that I received in March.

Q. I'm going to ask you to turn to Exhibit 16, please.

A. Yes.

Q. Could you identify that letter for us, please?

A. That was the letter addressed to me from - signed by George Rowe, indicating that we have had 30 days to remove our boxes from the City right-of-way.

Q. And it also indicated in the final paragraph, did it not, that if you wished an administrative hearing, you could have one?

A. Yes.

Q. And did you, in fact, request such a hearing?

A. I did.

Q. And could you tell us whether you participated in a hearing?

A. I did.

Q. And when did that take place and with whom?

A. The hearing was on April 5th and there was a representative of the Public Works, of Engineering, and of the City Solicitor's Office present.

Q. Was Mr. Young present?

A. Yes, Mr. Young was present, Mr. Ganulin.

Q. Mr. Ganulin who is seated at counsel table?

A. Yes.

[p. 90] Q. Did the City ever ask you to make any changes in either the type of newsrack that you used or the manner in which you anchored it or affixed it to the right-of-way?

A. The City did not approach us directly. I was invited to a meeting in January which was organized by some of the other people with newsracks on the streets and we learned there of some of the City's concerns with regard to chains and so on and proposed a voluntary plan

back to the City which we agreed to participate in to address some of those concerns; for example, plastic sleeves on chains, or whatever.

Q. So you have indicated to the City a willingness to conform your news boxes and the manner in which you present them on the City right-of-way in accordance with whatever City regulations are needed?

A. Yes.

Q. Have you ever indicated to the City or any of its officials that you would not change the manner either of your newsrack or the way in which you utilize your newsrack?

A. No. In fact, I tried to be invited to the meetings which took place, which resulted in the draft regulation that's now on the drawing board, and I was not - I was told I was not invited to those meetings.

Q. I'm going to ask you to turn to Exhibit Number 3, please.

A. Yes.

Q. Is that the proposed regulation that you've just [p. 91] mentioned?

A. This was the first time I have seen this particular form, but yes, it does seem to address the issues that I spoke with Mr. Richardson about.

Q. I'm going to ask you to take a moment to look at this particular exhibit if you've not yet seen it.

A. Uh-huh.

(Witness reading the exhibit.)

A. I have read it over quickly.

Q. Have you reviewed Trial Exhibit 3, which is the proposed Administrative Regulation dated June 14th, 1990? Is there any provision set out in that exhibit which Discovery Center would not be able to comply with as relates to its newsracks?

A. Based on a quick review, I would answer no.

Q. Is there any provision or requirement set out in this proposed regulation that Discovery Center would be unwilling to comply with?

A. No, I don't think so.

Q. What percentage of the Discovery Center Magazines are distributed currently by means of newsracks placed on the City right-of-way?

A. Approximately a third; about 32- to 33 percent.

Q. And what were -

THE COURT: A third of your magazines are distributed through newsracks. Is that what you're saying?

[p.92] THE WITNESS: Yes, sir.

Q. What is the significance of Discovery Center's being able to distribute its magazine through newsrack?

A. Well, it's a third of our distribution. It's become an important - over the last year-and-a-half, it's become an important way for people to recognize us and they know they can always find our magazine, you know, by

going to their street corner, and that's important. If those were to disappear all of a sudden, I think that would cause some irreparable harm to us and, frankly, there is not another way for us to distribute those same 32 percent in the kind of way - in that kind of way and reach the same kinds of people.

Q. Are you aware of any comparable means of distributing those magazines which would have the same impact for your business as to newsrack?

A. Well, from 1982 to 1989 we tried to find various means, the most effective means, and this has been the most effective means that we have found thus far.

MR. MEZIBOV: That's all the questions I have, Your Honor.

THE COURT: Thank you. You may cross.

CROSS-EXAMINATION

BY MR. YURICK:

Q. Ma'am, my name is Mark Yurick. I represent the City of Cincinnati, the defendant in this case. Ma'am, you don't [p. 93] contend that you publish a newspaper; do you?

A. I don't contend we're a newspaper.

Q. Okay. And, in fact, the information that's contained in your magazine, and as to your courses, is basically or solely a description of the course and then any materials' fee and then the fee for the course; isn't that right?

A. No; in addition to the class listings and course descriptions there are also some outside advertisers who use our publication and some other offerings of tapes and books and so on to complement our classes.

Q. Advertising; isn't that correct?

A. Those businesses are advertising.

Q. It's all advertising?

A. Well -

Q. You're advertising your classes and then some outside agencies utilize your magazine to advertise their services, but it's all advertising?

A. I don't know. I guess. I mean, in some regard.

Q. And you stated earlier that this is the way you choose to advertise your programs; isn't that right?

A. Right.

Q. Okay. And you had tried other means of advertising that are available to you and there are other means of advertising available to you but you just don't think they are as effective as this way; isn't that right?

[p. 94] A. I suppose.

Q. Okay. You are again a for-profit corporation; isn't that right?

A. We are.

Q. You don't have any sort of tax exempt status or you're not - you provide adult education and other sorts of classes for money. That is what you do; isn't that right?

A. We market and promote instructor's classes. They are not our classes; we're not a school.

Q. Okay. For which you get a fee? You market it and promote these classes and get a fee?

A. Only if someone registers for the class. There is no purchase inherent in picking up the magazine.

Q. Right. But the reason that you publish the magazine is to get people to apply for these classes so that you can get the fee; that is your -

A. Usually.

Q. - your reason for being?

A. Yes, that's -

Q. And is it also correct that your testimony was two-thirds of your magazines are distributed outside these dispensers; is that correct? Through direct mail or through, I don't know, dropping them off on people's porches, et cetera?

A. We don't drop them off on people's porches, but other means.

[p. 95] Q. Other means. Two-thirds?

A. Approximately.

MR. YURICK: I have no further questions - oh, I'm sorry; yes, I do have a couple other questions.

Q. Did you pay a fee to the City of Cincinnati for permission to place these dispensers on the public right-of-ways?

A. No, there is - no, there was no fee required.

Q. And have any of your boxes, to your knowledge, been disturbed by any member of the City of Cincinnati?

A. Yes; on occasion when there are street festivals or whatever, they have cut the chains and moved the boxes back, that sort of thing.

Q. But, I mean, have representatives of the City of Cincinnati come and confiscated your boxes?

A. Not that I'm aware.

Q. Well, that is what I am asking you -

A. Okay.

Q. - to your knowledge.

A. To my knowledge, no.

MR. YURICK: I have no further questions at this time.

MR. MEZIBOV: I have nothing further of this witness.

THE COURT: Thank you, Ms. Moertl. You may step down.-

(Witness excused.)

[p. 96] MR. MEZIBOV: Your Honor, our next witness will be Greg Goff.

THE COURT: How long will he take?

MR. MEZIBOV: Approximately the same time as Ms. Moertl. Maybe a little shorter.

THE COURT: I would like to recess here by quarter of 12:00. How many more witnesses do you have, Mister -

MR. MEZIBOV: This will be our final witness.

THE COURT: All right. And how many witnesses do you have, Mr. Yurick?

MR. YURICK: I have two witnesses, Your Honor: Mr. Young and Mr. Richardson again. They'll be very quick.

THE COURT: Okay. Well, let's start with this gentleman and we'll recess at quarter of 12:00 and probably resume quarter after 2:00, and that should give us plenty of time to finish the testimony.

MR. YURICK: It should.

THE COURT: I would like you to think during the lunch hour, Mr. Yurick, if this regulation, I guess Plaintiffs' Exhibit 3, is adopted by the City, that would accommodate all the needs under the constitutional strictures of public health, morals and public health, safety and convenience; wouldn't it?

MR. YURICK: I'm not sure it would, Your Honor, and I guess I'll get more into that in my case. Part of the proliferation argument is there is a limited number of space -

[p. 97] THE COURT: The regulation talks about that.

MR. YURICK: There is a limited number of space and to put purely public commercial speech on the

right-of-way, which is a public forum, I believe is impermissible under the Constitution in the United States as it's been applied by the Supreme Court, and the Supreme Court has made a clear distinction between the protection to be attached to commercial speech and the protection to be afforded non-commercial speech. And I think if the Court puts the two forms of speech on a par, I think it's constitutionally impermissible.

THE COURT: You're assuming something I haven't done. It's the City who is adopting this proposed regulation and the proposed regulation doesn't distinguish between the two. Now maybe the proposed regulation will go one step further and maybe set up some method of giving priority to newspapers but without eliminating the other -

MR. YURICK: Without eliminating -

THE COURT: - "the other" being the folks such as the plaintiff in this case and the Christian Singles. Well, I guess there are several other publications that may use racks.

MR. YURICK: Well, I think that -

THE COURT: You see, I have to decide this case also on the least restrictive method. The whole concept under the Bill of Rights is to permit people to do what they want and not restrict them. The Bill of Rights comes into play where their [p. 98] activity interferes with rights of others or the City is interfering with rights guaranteed under the Bill of Rights.

MR. YURICK: That's correct.

THE COURT: Least restrictive way of interfering with the citizens may be less restrictive than what you're doing, barring them entirely any commercial speech through the use of newsracks.

MR. YURICK: Well, there I think that the -

THE COURT: Is my analysis correct in what my duty is?

MR. YURICK: With all due respect to the Court, I really don't think it is.

THE COURT: I appreciate your candor. I would like you to tell me -

MR. YURICK: I don't think it is a least restrictive means test in the area of commercial speech. I think there is a four-part test that's been adopted by the Supreme Court -

THE COURT: Uh-huh.

MR. YURICK: - and that in those cases where the Supreme Court talks about how burdensome the regulation can be or how restrictive the regulation can be, they talk about one directly affecting the safety - the - directly affecting the substantial state interest and also talk about barring no more speech than is necessary to accomplish the required directive, and I think it is a lot different than saying it is a least [p. 99] restrictive means test.

THE COURT: Barring no more speech than is necessary, I think, is somewhat similar to the least restrictive method of keeping the public from having an opportunity to view these things that are purveyed by the

plaintiffs here which just effects the plaintiffs' right to expression to -

MR. YURICK: But the plaintiffs, and I believe there is testimony to this fact - we're not barring speech. Two-thirds in *Discovery Learning's* case.

THE COURT: Yes, I understand.

MR. YURICK: We're not barring that speech. There is a very non-communicative aspect to the physical presence of this box -

THE COURT: Uh-huh.

MR. YURICK: - this dispenser, and that is what we're trying to regulate. We're not saying they can't -

THE COURT: If they were just regulating the box, it doesn't matter what is in the box, it is just the box you're regulating.

MR. YURICK: For instance, if there was nothing in the box, I think the Court could agree the box can't be there. There is no First Amendment protection there.

THE COURT: It is probably unrealistic, too. It would be sort of an absurd example because nobody would go to the expense of buying a box and putting it there.

[p. 100] MR. YURICK: Probably not. But the example, while it is absurd, puts the light on the uncommunicative nature of the box. I mean, there is a very definite uncommunicative nature to the box. Like a billboard -

THE COURT: A billboard is communicative.

MR. YURICK: But it also has a non-communicative -

THE COURT: It has a physical aspect to it.

MR. YURICK: It has a physical aspect which may interfere with the public's -

THE COURT: And that is what I'm concerned about here. Isn't that what you're concerned about, the physical aspect of the box interfering with the public safety and convenience?

MR. YURICK: We are. And we think that the -

THE COURT: And the real problem in the proliferation, as Mr. Young puts it, is because you want to give the newspapers a priority, is really what the City wants to do; and with the proliferation, if you let everybody else in, then the newspapers may get squeezed out.

MR. YURICK: They may very well, and I'm not sure the Constitution -

THE COURT: That is why I brought up the business about the taxicabs where you try to put a cap, the City puts a cap, because of public safety and convenience, on the number of taxicabs. How to handle it, they put a freeze on, and those [p. 101] that are first there can use them, and those that can only get them get a medalion or a license for the cab when one becomes available.

MR. YURICK: Well, I'm not -

THE COURT: And does that get into a little bit you granted the license to these folks, then you change the rules after you granted them the license and made their investment?

MR. YURICK: We think an employee of the City granted those improperly.

THE COURT: Whose fault is that?

MR. YURICK: Well, I guess it is the employee's fault.

THE COURT: No, I think it is the City's fault in a situation like that.

MR. YURICK: Well -

THE COURT: Let's assume we're concerned about proliferation so you put a limit on the quantity that can be at any street corner or in the city, however you want to use it. And how do you cut off folks that want to have it but haven't? You put a limit on, and those that are there have them, and as they decide to remove them or give up their location, if somebody else wants it, they can apply for it and get it. Wouldn't have anything to do - maybe two levels: maybe allow a certain level of numbers and something else at different locations. There are two or three other newspapers that the [p. 102] public's interested in and you have four corners at every intersection.

MR. YURICK: Well, I think to the extent that that raises the situation where we may have to grant a license or a permit to commercial publications to the disadvantage of a newspaper, that would be constitutionally impermissible. I mean, clearly the *Metromedia* case stands for the proposition that certainly you cannot give commercial speech any more protection than non-commercial speech. Non-commercial speech is clearly paramount in the First Amendment constitutional analysis.

THE COURT: That's a pretty interesting argument. Okay. Well, why don't we take our noon recess now and start up about quarter after 2:00 or so.

MR. MEZIBOV: Fine.

THE COURT: And we'll have an opportunity, because I presume you're going to make a motion at the end of his case -

MR. YURICK: Yes, Your Honor.

THE COURT: And we'll address some of those issues and have a chance to hear your witnesses. I think the best way to handle the case, even though your motion may be well-taken - although I'm not saying it is by a long shot - I'm going to hear your testimony anyhow so we have a complete record, so if whatever I rule, may rule, the Court of Appeals will have an opportunity to see what the testimony was and see what was done [p. 103] in the event I didn't do the right thing. All right.

MR. YURICK: Thank you, Your Honor.

THE COURT: See you all after lunch.

(At 11:40 a.m., the luncheon recess was taken.)

* * *

GREGORY G. GOFF

[p. 106] A. Most real estate in the United States - and when I say "real estate," I'm speaking of residential real estate as opposed to commercial real estate - most residential real estate changes hands through professional real estate brokers. Most real estate brokers are members of boards of real estate organized by the community and most of these boards offer a service called the Multiple Listing Service which is probably the most powerful tool

for marketing real estate. It is a computer program that maintains all information on homes available in the given community. However, outside of the Multiple Listing Service, the real estate brokers themselves have a need to communicate with the community and the community has a need to receive that information, and the advertising vehicles available to them are predominantly the yard sign located in the front yard of the home for sale, the newspaper classified section, and publications such as *Harmon Homes*.

Q. Now, do you publish a magazine or a periodical, your company that is?

A. Yes.

Q. And what is the name of that magazine?

A. In Cincinnati it's referred to as *Harmon Cincinnati Homes*.

Q. I'm going to ask you to look at Exhibit 25, please. Mrs. Schaeffer has that.

(Clerk handing the exhibit to the witness.)

MR. MEZIBOV: Thank you.

[p. 107] Q. Could you identify for us, Mr. Goff, what has been marked as Trial Exhibit 25?

A. This is our publication, *Harmon Cincinnati Homes*.

THE COURT: What's it called again, Harmony [sic] -

THE WITNESS: *Cincinnati Homes*.

THE COURT: Okay.

Q. How often is that published?

A. It comes out every two weeks.

Q. And do you offer a similar publication for the other locations around the country in which you - in which you do business?

A. Yes. In some markets it is weekly, in some markets it is monthly, but most markets it is every two weeks.

Q. Could you tell us, Mr. Goff, what information is intended to be conveyed by that magazine?

A. Generally the reader is interested in determining the range and scope of real estate, residential estate, available in the community. The publication attempts to convey that in terms of both pictures and words.

Q. Now you've indicated that real estate is marketed by means other than magazines such as yours. You've indicated that newspapers also provide information concerning available residential properties, and there is a concept and a practice here which we know as the yard sign; is that correct?

A. Right, that's correct.

[p. 108] Q. What difference, if any, is there between your publication and the newspaper advertisement and the yard sign?

A. Well, the predominant difference between obviously the newspaper and the yard sign, or *Harmon Homes* and the yard sign, the yard sign, is only a point of information if you're willing to drive a while for long period of time to determine what is available. Obviously,

that is not generally an efficient way to learn about real estate. The difference between *Harmon Homes* and the newspaper is that the newspaper is a mass vehicle; that is to say, it reaches essentially everyone in the marketplace or a large percentage of the marketplace. But because of the number of copies that it circulated, it's very expensive to put a lot of information in the newspaper. So the service that *Harmon Homes* offers to the real estate professional and to the public in general is that because we only circulate enough copies to satisfy the needs of those people interested in real estate information, real estate professionals can place a great deal more information which manifests itself for most people in the choice, including photographs. It would not be feasible for West Shell or Sibcy Cline or any local organization to provide this volume of information in the newspaper to the public. It would be too expensive.

Q. How is the information which is contained in your particular magazine brought to your magazine for publication?

[p. 109] A. The area manager is responsible for visiting each of the real estate professionals at a predetermined time during the week. We collect the photographs and the copy and that is sent to one of our production facilities and laid out and published.

Q. Do you provide or do you charge a reader to obtain a copy of your publication?

A. No, all our publications are provided free of charge.

Q. Could you tell us how that particular *Homes Magazine* is distributed in the Cincinnati area?

A. We have four predominant vehicles of distribution: banks; grocery stores and other similar retail establishments; real estate offices themselves; and street boxes or newsracks.

Q. And what is the significance to you of being allowed to distribute your magazine via news boxes?

A. Well, outside of the obvious of having copies picked up out of the news box, our predominant competitor is the newspaper. Historically, people interested in real estate information relied on the newspaper as it was the only source of information. Many readers or potential readers may or may not be aware of the existence of our publication; they generally are aware of the existence of the newspaper. We believe that by positioning our newsracks alongside the newsracks for the newspaper, that as people go to the newspaper, they will become aware of our publication and, thus, we get the newspaper audience for our magazine.

[p. 110] Q. Let me back up because I neglected to ask you one question. You indicated in response to my question of what information is intended to be conveyed by your magazine that you do provide information about what residential properties are available for purchase; is that correct?

A. Yes.

Q. Is there other information which from time to time or on a regular basis is intended to be conveyed in your publication?

A. From time to time we do provide other articles as to financing choices, mortgages, tips on how to maximize your investment in real estate. These articles appear not on a regular basis but on an occasional basis.

Q. And what is the significance of that or the relationship of that to the other information you convey in your magazine?

A. Well, we think that the thing that people are most interested in seeing in the magazine is the pictures of the homes. So, we try to dedicate as much space as possible to that, but we think it is just an added service that rounds out the publication to provide the occasional articles. We find most people pick up at least five of these magazines in a row in five different editions during the time they are trying to become educated about real estate, and so these articles don't need to appear in every single edition, but during the course of the time they pick up the magazine, they will be exposed to the articles. And the feedback we get from the real estate [p. 111] professionals is the reader and the real estate professionals that participate in the magazine both appreciate the additional information.

Q. When was it, Mr. Goff, that Harmon determined it wished to distribute its publication in the Cincinnati area by means of newsracks?

A. Well, Harmon Publishing acquired the Cincinnati magazine from a previous publishing company. We have actually acquired quite a number of these publications. We have had as our distribution strategy the addition of the street boxes wherever we go, and we are currently -

we have placed these street boxes in over a hundred cities at this point.

Q. At the current time is your publication being distributed by means of news boxes in other cities?

A. Yes; as I say, approximately a hundred cities have received the street boxes and we have other street boxes warehoused prepared to go out into additional cities.

Q. Let me ask you to look at the exhibit book and turn to Trial Exhibit No. 5, if you would.

A. Okay. I have it.

Q. Are you familiar with that particular document?

A. Yes, I am.

Q. Would you tell us what that is, please?

A. This is a document from our division - Division Circulation Director located in Canton, Ohio requesting [p. 112] permission to place the boxes in Cincinnati.

Q. What is the date of that, please?

A. July 13, 1989.

Q. Is that No. 4 rather than No. 5 Trial Exhibit?

-THE COURT: It has a 5 on it.

MR. MEZIBOV: Look on the the -

THE WITNESS: I'm looking at No. 5.

THE COURT: What exhibit?

MR. MEZIBOV: Can I compare notes to make sure we're on the same wavelength?

THE COURT: Go right ahead.

(Mr. Mezibov consulting with the witness privately.)

Q. Let's start with No. 4, I think.

A. Okay.

Q. I confused you or you confused me.

A. Exhibit 4 is a letter from the same Mr. Harmelink to Mr. Young here in Cincinnati.

Q. That is dated July 13th, 1989; is that correct?

A. It is, yes.

Q. And now turn to Exhibit 5, please. Can you identify that for us, please?

A. Right. That's the Exhibit A to that same request of that's from Plaintiff's Exhibit 4.

Q. And would you turn to No. 6, please?

A. This details the locations where we wished to place the [p. 113] boxes.

Q. And is this an accurate listing of the locations at which Harmon has placed its news boxes?

A. To my knowledge it is, yes. I prepared this list myself.

Q. And would you turn to Plaintiff's Exhibit or Trial Exhibit 7, please?

A. This is a map where we have replicated the list on Exhibit 6.

Q. And this information, the information contained in Exhibit 6, the information contained in Exhibit 7, is required by Cincinnati regulations; is that correct?

A. To my knowledge, that's correct.

Q. And would you turn to No. 8, please? Could you tell us what that is?

A. That is a Certificate of Insurance indicating that we're covered for liability related to street boxes.

Q. And that, too, is required by Cincinnati regulation; is it?

A. Yes, it is.

Q. And you remain in compliance with that -

A. Yes.

Q. - with that prerequisite? Could you turn to the next exhibit, please, Exhibit 9?

A. Yes.

Q. Could you identify that for us, please?

[p. 114] A. This is the letter we received granting us permission to place the boxes.

Q. Now, since the time that your company received permission to place its publication in the news boxes on the City right-of-way, have you received any complaints from the City or anyone else concerning accidents or dangers posed by your news boxes?

A. No, we have not.

Q. Have you received any specific complaints concerning the appearance or the manner in which your news boxes are maintained?

A. Not to my knowledge.

Q. Would you turn to the next exhibit, please?

A. Ten?

Q. Yes.

A. Yes.

Q. Could you identify that for us, please?

A. This is a letter again sent to Mr. Harmelink indicating that we should remove the boxes.

Q. Now, was this the first time you or your company was advised that your publication and/or its newsrack was in violation of any City regulation?

A. Yes, it was the first time.

Q. Was it your understanding - strike that. What was your understanding of your ability to place [p. 115] newsracks on the City right-of-way back in July of 1989 when you submitted your application?

A. We asked if there were any specific codes. We were told that you had to apply for permit and that you had to, you know, adhere to certain questions of right-of-way; but outside of that, there were no specific regulations. We applied as instructed and received the letter that was mentioned in this previous exhibit.

Q. Were you told by anyone on behalf of the City that you would not receive permission to place your newsracks on the City right-of-way?

A. No, we were not.

Q. Were you told that the City intended to change its rules and regulations?

A. No, we were not.

Q. Would you turn to Plaintiff's Exhibit or Trial Exhibit 12, please?

A. Twelve?

Q. Yes. (Witness reading.)

A. Okay.

Q. Is that a letter from Mr. Rowe to Mr. Maggiotto?

A. Yes, it is.

Q. Would you tell us who Mr. Maggiotto is?

A. Mr. Maggiotto is our corporate counsel.

[p. 116] Q. And what was the substance of this particular letter?

A. Similar to the testimony given from the Learning or Discovery Center: they heard our appeal concerning our desire to remain on the street and refused to recognize our right to be on the street.

Q. Have you ever indicated to the City personally or through some other official of Harmon's that you were unwilling to work with any proposed regulation the City might have concerning the regulation of newsracks?

A. No, we have not - I have not done that.

Q. I'm going to ask you to turn to Trial Exhibit Number 3, please. Now this purports to be a proposed

regulation of the City of Cincinnati which is dated July 14th, 1990. Are you familiar with this proposed regulation?

A. I have read through it.

Q. And are you satisfied that you're familiar with the -

A. I am familiar.

Q. - the provisions contained in that -

A. Yes, I am.

Q. document? Are there - is there any particular provision or any particular requirement contained in this document which Harmon would be unable to comply with?

A. No, there is not.

Q. Is there a particular provision or requirement in this [p. 117] document which, if adopted, Harmon would be unwilling to comply with?

A. No, there is not.

Q. I'm going to ask you to look at the photographs which have been marked for evidence.

(Clerk handing the witness the exhibit.)

Q. And more particularly I'm going to ask you to look at the photograph marked Exhibit 33C.

A. I have it.

Q. And could you tell us what's depicted in that photograph?

A. Three newsracks: *Business Courier*; *The Cincinnati Post*; and *Harmon Homes* newsrack.

Q. Now with particular regard to the Harmon newsrack, is that the newsrack which Harmon has utilized throughout the City?

A. Yes, it is.

Q. At approximately how many locations is it?

A. Twenty-nine, to my recollection.

Q. And is that the newsrack that the City - that Harmon uses in other locations throughout the country?

A. Yes, in almost all instances. However, there are - there have been occasions where the city has requested a different fixture and we have complied in all cases where the city has made a specific request.

Q. Through what other structures or device does Harmon distribute its publication in other cities?

[p. 118] A. Are you speaking in terms of outside newsrack or just in general?

Q. Outsides newsrack, yes.

A. The most well-known example is San Francisco, which the way San Francisco regulates the racks is that the city has provided a certain number of racks and they - for a fee - ask the publishers to pay a fee to be in those racks that is provided; a standard look, it is for esthetic reasons. San Francisco is very interested in the esthetics of the city, and they got to the point they didn't like all the different racks on the street, so they have provided a common rack and we pay to be in that rack.

Q. What kind of publications are distributed through that rack in San Francisco?

A. The daily newspaper, *The Wall Street Journal*, our publication, other publications similar to ours.

Q. So you, in effect, share a common situs in a common device by which to distribute your publications along with other types of publications?

A. Yes, it is. And San Francisco is able to eliminate the question of racks being chained to public property, et cetera

A. All these common - they call them "kiosks" - they are bolted directly to the sidewalk.

Q. Have either you or has either - strike that. Has anyone on behalf of Harmon ever indicated to the City [p. 119] of Cincinnati that they would refuse to distribute their newsracks by means of any other device such as that contained in Exhibit 33?

A. No, we would willingly put out any type of box the City would specify.

Q. What would the impact on Harmon be - strike that. Could you describe what impact there would be if - on Harmon and on others if you were unable to continue to use newsracks in Cincinnati to distribute your publication?

A. Well, it is our belief that that is a significant percentage of the population that is no longer exposed to the publication through its predominant historical distribution point, namely banks. Historically, the Cincinnati magazine was distributed exclusively in banks which was

fine prior to the advent of the automatic teller. With the advent of the automatic teller, we don't frequent banks anymore, so we have an entire professional community that works Downtown in Cincinnati that is very interested in the information contained in the *Homes Magazine*. We believe that the street vending box allows us to reach that audience, and the real estate professionals that are in the magazine have indicated to us that they share that belief. West Shell Realty, the largest user of our magazine, as a matter of fact, phoned our direct manager just yesterday to re-emphasize their interest in Cincinnati Downtown news boxes.

[p. 120] Q. We might have touched on this earlier, but is the information contained in your publication identical to that which is contained in *The Cincinnati Enquirer*, for example?

A. No, it's not.

Q. In what way is it different?

A. Well, the predominant difference is the variety of listings that are contained in the *Homes Magazine*, the specific homes that are contained in the *Homes Magazine*, and most importantly the fact that each listing in the *Homes Magazine* contains a photograph. If you go through *The Cincinnati Enquirer*, you may find several three-bedroom homes mentioned in West Chester with tremendous differences in price, and it may be somewhat difficult for someone who is trying to become educated in real estate in West Chester to understand why there is this range. But with the *Homes Magazine*, you're assisted by the photo and it is pretty easy to see oh, this house is, you know, much nicer or larger; despite the fact it is still a

three-bedroom, it is nicer and larger, thus the difference in the price. So I would say the predominant difference between us and *The Enquirer* is the addition of the photo. Again, I haven't gone through *The Enquirer*, but I would venture to guess there may be a larger selection and greater breadth of information about homes in our magazine than in *The Enquirer*.

Q. In terms of quality and quantity of information which a reader may have about real estate, what difference then would [p. 121] there be between receiving your particular publication and simply *The Enquirer's*?

A. Well, as I said, I believe it comes down to the photographs. To use the cliché, a picture is worth a thousand words. And if I'm trying to visualize the type of real estate I'm interested in or get a better understanding of what types of homes are in a given community, those pictures speak very loudly to me as to what the community is like.

Q. You've indicated in addition to banks at one time you also distributed to your your - publication or your attempt through grocery store outlets; is that correct?

A. That's correct.

Q. Are there any grocery store outlets or chains in the Greater Cincinnati area from which you are unable to distribute your publication?

A. Yes, Kroger.

Q. And how many outlets then are you not permitted to utilize, if you know?

A. I don't know the number of outlets but I know that Kroger's market share is somewhere around 50 percent, so that's a significant barrier for us.

Q. And again, if you were unable to distribute your publication by means of newsrack on the City right-of-way, what impact would that have on your business?

A. We think it could be potentially significant given that [p. 122] some of our largest revenue source, for example, is West Shell Real Estate and they, for one, have come forward and said specifically that the Downtown vending boxes are an important reason why they utilize our product.

Q. Mr. Goff, have you been contacted by the City of Cincinnati with regard to their proposed regulations of newsracks which I have shown you as Exhibit 3?

A. I was not personally contacted; the company, however, has been contacted.

Q. In what form and for what purpose?

A. I believe Lou Maggiotto has been in communication with them to understand the background of why we're not being permitted to stay on the streets.

Q. It's accurate that Harmon's never been asked to participate in the preparation or development -

A. No.

Q. - of the proposal; is that correct?

A. No; no, we have not.

Q. You have been specifically excluded from those conversations?

A. This is the case, yes.

MR. MEZIBOV: Thank you, Mr. Goff. I have no further questions, Your Honor.

THE COURT: Okay. You may proceed.

MR. YURICK: Thank you, Your Honor.

[p. 123] CROSS-EXAMINATION

BY MR. YURICK:

Q. Mr. Goff, I just have a few questions. You, again, are not claiming that you publish a newspaper; is that correct?

A. I would not use that word, no.

Q. Clearly, that is not a newspaper then in your understanding?

A. I believe most people would refer to it as a magazine.

Q. Okay. And again the purpose of your magazine is to advertise real estate listings; isn't that correct?

A. To communicate what's available in the way of real estate, yes.

Q. It's communication but it's - you're communicating - you have a picture of a house, you have a little description of the house, and then you have either a price or who to contact to get the price; is that correct?

A. That's correct.

Q. Okay. And that - other than that, there is really no significant other communication in that magazine; isn't that correct?

A. Outside of the occasional article that does exist.

Q. Okay. But you stated that - how long - how much space or how much - how much of your magazine is dedicated to these articles?

A. Four pages at most.

[p. 124] Q. When they appear?

A. When they appear, that's correct.

Q. And how often would you say they appear?

A. I'd say it is more likely that a publication would have an article than not have an article, so in excess of 50 percent of the time but less than a hundred percent.

Q. And again you're a for-profit corporation; is that correct?

A. Yes, we are.

Q. Okay. Basically, real estate companies contact you, pay you to list their homes in their magazines and you do that; is that correct?

A. That's correct.

Q. You're published every two weeks. You don't have articles in there about current events or articles referring to political happenings or -

A. Not political happenings; however, we do have articles concerning trends in mortgage rates, et cetera, that could be considered by some to be a current event.

Q. Okay. You said that you had three vehicles of distribution, is that correct, other than these boxes that you put on the -

A. Right.

Q. - City right-of-way? You also distribute through banks?

[p. 125] A. We distribute - actually, there is an additional way that I forgot to mention, but our predominant distribution is banks and grocery stores. We do also distribute in the real estate offices themselves, although that is predominantly for the benefit of the professional rather than the public, the newsrack. We also do have an 800-number service for people that are moving to Cincinnati from outside locations and they can call.

Q. Okay. How many - in terms of your current circulation, what percentage of your publication is distributed through newsracks, if you know?

A. It's approximately, excluding those copies that go to the realtor, it's approximately 15 percent of every -

Q. Fifteen percent?

A. That's correct.

Q. So 85 percent of your publication circulation is through these alternative means; is that correct?

A. That's correct.

Q. Did you have to pay a fee to the City of Cincinnati for permission to place these dispensing devices on the public right-of-way?

A. We would be willing to but none has been requested.

Q. To your knowledge, has anyone at any time interfered with, confiscated, damaged, et cetera, any member of the City of Cincinnati, to your boxes?

[p. 126] A. No, not to my knowledge.

Q. Again, you did have an administrative hearing before a board; is that correct?

A. Yes, we did.

Q. Okay. And you stated that - strike that.

MR. YURICK: Could I have a moment to confer with co-counsel?

THE COURT: Yes, you may.

MR. YURICK: Thank you, Your Honor. (Mr. Yurick and his colleague conferred privately.)

MR. YURICK: I have no further questions of the witness, Your Honor.

THE COURT: All right. Thank you, Mr. Yurick. Anything on redirect?

MR. MEZIBOV: Just one or two questions, Your Honor.

REDIRECT EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Goff, do you require the permission of a bank to distribute your magazine?

A. Yes, we do.

Q. And what about from a grocery store?

A. Same thing; yes, we do.

Q. So if these sources say no to you, you are without the ability to distribute your magazines at those locations?

A. That's correct.

[p. 127] MR. YURICK: I'd object. I would just object to the question as -

THE COURT: What was the question? It was a leading question, as I recall.

Q. What would be the result of a grocery chain or store or a bank advising you, you could not use their premises as a location from which to distribute your magazine?

MR. YURICK: Again, I'll object to the question as being speculative, Your Honor.

THE COURT: Can you answer without speculating?

A. Well, in the absence of banks or grocery stores, we would go to other retail establishments or, you know - there is a risk that there would not be a suitable alternative, but we would attempt to find one.

MR. MEZIBOV: That's all the questions I have, Your Honor. Thank you.

THE COURT: Thank you. You may step down. (Witness excused.)

THE COURT: All right. Do you have anything else?

MR. MEZIBOV: Your Honor, we have no further testimony to present. I would simply at this time offer our exhibits.

THE COURT: Okay. The exhibits are all admitted.

MR. MEZIBOV: And I would also, Your Honor, again offer into evidence pursuant to Rule 32 the depositions of Mr. [p. 128] Young, Mr. Mann, and Mr. Richardson which were taken on June 21st of this year which have been filed with this court.

THE COURT: All right. They're admitted.

MR. MEZIBOV: Thank you, Your Honor.

(Depositions of Messrs. Young, Mann and Richardson were admitted.)

MR. YURICK: Your Honor, at this point I would like to make a motion for directed verdict.

THE COURT: You may do so.

MR. YURICK: Your Honor, I'd like to address the motion for directed verdict to the plaintiffs' claims sort of in backwards order.

The procedural due process claim, I believe the plaintiff has not proven. He has failed to show that there is - first of all, I think he has failed to show there has been any taking; then again, I think there was an administrative appeal procedure and I think that the plaintiff hasn't shown that that appeal proceeding was so wanting in

fairness or objectivity that it would constitute a violation of its procedural due process claims. I think the testimony was that there was an administrative hearing provided for, the plaintiff was notified of the administrative hearing, and, both plaintiffs, and those hearings were held; therefore, we would ask that the Court grant the City's motion for directed verdict as to the procedural due process claim.

[p. 129] On the First Amendment and Fourteenth Amendment claim, again I think that plaintiff has failed to show that the City's regulatory scheme taken as a whole, as mentioned in my trial brief, lacks or doesn't pass constitutional muster under the applicable commercial speech case law. I think the testimony from both of the plaintiffs has been that their publications are commercial in nature. I think that the record shows that they're purely commercial publications. The test in the United States for the constitutionality on a legislative restriction of commercial speech is that it's a four-part test and the test is set out in *Central Hudson Gas & Electric Corporation versus the Public Service Commission*; that's 477 [sic] U.S. 555, 1990. I think that case is in both the plaintiffs' brief and in our - the defendant's brief.

A government restriction on commercial speech is valid if assuming the speech is - concerns lawful activity and is not misleading, and we're not questioning that; the regulation directly advances a substantial government interest, and the regulation reaches no further than necessary to accomplish that interest.

Now as to the question that the Court asked before the adjournment, that test sort of sounds like a least

restrictive means test. But the way the test was applied, particularly in the *Metromedia* case, it is clear it is not a least restrictive means test and, in fact, in *Board of Trustees* [p. 130] of *Southern University of New York versus Fox*, which is 492 U.S. - no page number on the official reporter - 109 Supreme Court 3028, 106, Lawyers Edition 2d, 388, 1989, and this is also mentioned in the plaintiffs' brief, "... restrictions upon commercial speech need not employ the 'least restrictive means' to achieve the identified governmental interest. It is sufficient if the regulations are not 'burden substantially more speech than is necessary.' "

THE COURT: Let me ask you a question. If you use this new regulation, proposed regulation drafted, I presume, in June of 1990, Plaintiffs' Exhibit 3, it would accomplish everything you want to accomplish. Wouldn't it?

MR. YURICK: No. As a matter of fact, the only way we could accomplish everything we want to accomplish is to ban all these boxes of both newspapers and commercial publication.

THE COURT: No -

MR. YURICK: I'm sorry, Your Honor.

THE COURT: This regulation permits news boxes but tells where it can be located, the safety and convenience and proliferation concerns of Mr. Young.

MR. YURICK: As an accommodation to an admittedly higher First Amendment claim of a non-commercial publication. But when you have a commercial publication -

THE COURT: It doesn't talk about content at all; just talks about the physical size and location of these [p. 131] things.

MR. YURICK: Well, it's our position that the Legislature, and it's well - I think it is well-pointed out in the case law that the Legislature can make a distinction and, in fact, has to make distinction between commercial and non-commercial speech.

THE COURT: Why does it have to make any distinction at all? The regulation you're drafting will probably be adopted. It doesn't talk anything about speech.

MR. YURICK: If we were to apply that - assuming that that's ever passed into law -

THE COURT: Okay.

MR. YURICK: -if we were ever to apply that test to both commercial and non-commercial speech evenly, it would be clearly unconstitutional under the *Metromedia* case as putting commercial speech on a par with non-commercial speech. And this - this is an interesting -

THE COURT: Sounds like a bootstrap argument to me.

MR. YURICK: Please?

THE COURT: It sounds like a bootstrap argument to me. It doesn't sound right. It sounds like you're trying to constitutionalize something in a negative fashion. What we're talking about here, you don't have to restrain expression at all.

MR. YURICK: With -

[p. 132] THE COURT: You're not restraining expression at all. You're saying these boxes are permitted on the streets so long as they don't impede traffic, impede access, and they are so proliferated that they create a nuisance, in effect. It doesn't mean whatever is being purveyed in them.

MR. YURICK: Again, Your Honor, I think that - the person who has been trying to bootstrap here in my opinion is the plaintiff. He has been trying to put his clearly commercial publications on a par with non-commercial publications and he may not do it constitutionally. There is a significant difference in the jurisprudence between commercial speech and non-commercial speech. Non-commercial speech in the traditional public forum is clearly - clearly has a paramount interest to any interest that the government might have in safety or esthetics in terms of a less restrictive you would have to apply the less restrictive means test. But we do not have to apply the less restrictive means test in an area where we are only seeking to control and legislate commercial speech. It's clear from the case law. And that third part of that test saying that it reaches no further than necessary to accomplish the interest, they're talking about the legislative interest that is being sought - that is sought to be promoted by the legislation, in this case safety and esthetics. In fact, if you read the *Metromedia* case, they bring it out we are actually legislating less speech than is necessary to accomplish our [p. 133] goal because we are recognizing the first - the paramount First Amendment of the public forum in the newspapers. It

may sound like a bootstrap argument, Your Honor. I think -

THE COURT: What about when *The Saturday Evening Post* publishers and several other magazine publishers decide they want to start purveying their magazines using street boxes?

MR. YURICK: That is precisely - well, as to some - as to some of those, *Saturday Evening Post* or some similar news magazine, they probably do.

THE COURT: You know, your statute says that something is a commercial handbill that contains the same thing that you say that a newspaper contains.

MR. YURICK: Well, I was going to - going to address that a little later in my argument. But to the extent there is a facial challenge to this ordinance, since only commercial speech is sought to be regulated, under *Bates versus the State Bar of Arizona* - and I have other cases on point and they've been - that case has been specifically upheld by the Sixth Circuit that overbreadth and the doctrine of overbreadth allowing a facial challenge to an ordinance does not apply in the area of commercial speech. It's clear we're only seeking to regulate their commercial speech. And as applied and the statutory scheme as has been applied and as is written clearly makes exceptions for non-commercial speech, non-commercial speech like newspapers which may incidentally contain some [p. 134] commercial speech. I mean, there is a longstanding practice of allowing newspapers to be in vending boxes and there is no - we're not seeking to restrict their access. I mean, this commercial handbill legislation isn't being applied to newspapers. So

to the extent there is an overbreadth argument and a facial challenge, that clearly doesn't apply under *Bates versus the State Bar of California* [sic].

THE COURT: Okay.

MR. YURICK: I think the ordinances taken as a whole don't fall afoul of the constitutional protections that are afforded by the First Amendment and the Fourteenth Amendment and as applied through the case law, and we would ask for - that the motion for directed verdict on that claim be awarded as well or granted as well, excuse me. Thank you.

THE COURT: Thank you. Mr. Mezibov?

MR. MEZIBOV: Thank you, Your Honor. First, Your Honor, let me state that all of the arguments I would have in order to meet -

THE COURT: Let's deal with the procedural due process first.

MR. MEZIBOV: Fine, Your Honor. With regard to the argument concerning procedural due process, it's important to point out, and I'm sure the Court is fully aware, that the procedural due process means an opportunity to be heard in a meaningful manner. We have difficulty with seeing how the City

* * *

[p. 145] hear your evidence. I would like to take a short break and then we'll start with your evidence, if you will.

MR. YURICK: Thank you, Your Honor.

MR. MEZIBOV: Thank you, Your Honor.

(At 3:30 p.m., a short recess was taken.)

* * *

(3:46 p.m.)

THE COURT: You may proceed, gentlemen.

MR. YURICK: Your Honor, my first witness will be Mr. Bob Richardson.

THE COURT: Mr. Richardson.

THE CLERK: You've already been sworn.

THE COURT: You may proceed.

ROBERT H. RICHARDSON

a witness herein, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Richardson, I believe you have told the Court that you're the City Architect; is that correct?

A. Principle City Architect, yes.

Q. Okay. What do you do as a City Architect? What are your principle duties?

A. We're involved in many different things, primarily the design and upkeep of all city buildings, where there are 65-some, approximately 65. We're also involved in design and [p. 146] implementation of any portion of things built with public money; for instance, in the Downtown it is the public right-of-ways, streetscapes, the

skywalk system, sometimes the public-supporting projects like garages and open space, whatever.

THE COURT: Are you still the City wharfmaster?

THE WITNESS: No.

THE COURT: Did they take that job away from you?

THE WITNESS: I think the Recreation Department has that now. They take care of Sawyer Point and other things.

Q. Sir, when you say you're responsible for designing streetscapes, what in common parlance is the "streetscape?"

A. It is the public right-of-way and sidewalk area that surrounds the development project or a block of buildings Downtown. It encompasses the sidewalk, paving, the lighting system, the landscaping and/or the trees, and any street furniture and hardware that also is along the City right-of-way.

Q. So all these various elements that compose the public right-of-way are coordinated and designed through your office?

A. The existing ones obviously are not, but any new ones built we are involved in, yes.

Q. And you make conscious design additions with regard to these public ways and -

A. For the Downtown, basically there's a design plan called [p. 147] the 2000 Plan which was originally

published in 1982 which for the most part set a standard for the type of public right-of-way and design and environment, and it's concentrating on what is called the "core area," the original twelve-block area of Downtown that has a full paving system with a defined structural grid and brick paving as well as what we call the mall traffic control and lighting system, the tripod holes, and the traffic boom that incorporates the traffic signals and traffic signs and everything from fire boxes to trash cans and whatnot. Outside the immediate core area, or that twelve-block area, there is a fringe treatment which is a lesser treatment that is not paving the full sidewalk but simply paving a collector strip along the edge and using a monotube or single pole instead of a tripod, or three poles. That is the basic plan for Downtown.

Q. And in designing the streetscape system, are esthetics a consideration?

A. Yes, sir.

Q. Okay. Why do you consider - why does your office consider it necessary to consider esthetics and why do they do streetscapes?

A. Well, streetscapes in general are done, first of all, to improve the appearance of Downtown. It becomes sort of the front door to visitors and tourists, and business people stop or visit Downtown. It is the livingroom of the City. It also [p. 148] is done in a way to support private development. It is the City's leverage, esthetics, of producing the finished product by supporting what they can do in the public right-of-way and pay for that along with the skywalk system to hopefully leverage private development and also to maintain the existing people that are

Downtown and the other neighborhood business districts as well.

Q. So your office considered it important in keeping and attracting private investment to design these streetscapes with esthetics in mind; is that correct?

A. Yes, sir. Cincinnati being a northern city, we are competing with a lot of other cities our size and that is one of the techniques used to attempt to attract as much development as possible and keep the development we do have, increase jobs and increase the tax budget.

Q. Now you're familiar generally with dispensing devices that dispense various publications; is that correct?

A. Yes, sir.

Q. Okay. Do those in general - do they detract from the effectiveness of your streetscaping plans?

A. Yes, they do. Currently, for the most part, the streetscapes are designed with - starting with the lighting system and where you can put foundations and where functionally lights are required and where traffic signals are required and within incrementing spacing of parking meters and things, we're [p. 149] trying to incorporate all the elements in one location instead of having a whole series of Metro signs and parking signs and whatnot. These structures incorporate several elements in place and it sort of works together. If you start with a given block, which is 400 feet, we're working with car increments of meters and parking spaces and loading zones and whatnot, and then the spacing of the light poles, and

then the sidewalk pattern articulates usually the buildings, structural bay pattern and it picks up the terms used in the newer buildings, the granite border strips and inch strips, and then trees are placed with some regular pattern but also within the framework of where they can go concerning the bays and other things involved in Downtown.

Q. And how do these dispensing devices - how exactly are they -

A. They are sort of the one element that is not designed in the system. Everything, as I said, from parking signs and parking meters and trash receptacles and transformer boxes and fire boxes are incorporated in the whole esthetics problem and there boxes are randomly placed where they want them, attached to the poles, causing rust and causing problems with crosswalks and handicap ramps. It is one element that does not fit into the system. Primarily we intended to have what we call a "collector strip" which is three to four feet along the curb where the utilities run, various water, gas utilities and [p. 150] whatnot.

Q. And are you familiar with the amount of time, effort and money that goes into designing a streetscape generally?

A. Yes, sir.

Q. Okay.

A. In terms of money, I think as a ballpark figure, for the full treatment Downtown, may run in the range of 270,000- to \$300,000 for one single block face on one side of the street. And if you're doing both sides of the street,

obviously it is doubled that, so it is up to 5- or \$600,000 for one block on both sides of the street. And as far as time, it's -

THE COURT: That's for the streetscape?

THE WITNESS: Yes. Yes, sir.

A. As far as time, it's probably approximately two to three months for design and probably four to five months for construction, so you're talking eight to ten months total time.

Q. And again, these boxes, they detract from that streetscape plan in your opinion?

A. They are again the one element that is not regulated or articulated with the rest of the system.

Q. So they do esthetically detract?

A. Yes, they do.

MR. YURICK: I have no further questions at this time.

THE COURT: Thank you. You'd be satisfied that the [p. 151] administrative regulations, drafted on June 14th, 1990, were adopted by the City to regulate these boxes; would you not?

THE WITNESS: I would for the non-commercial dispenser.

THE COURT: No, not what is in the boxes but just the dispensing devices.

THE WITNESS: We were working with a group that was non-commercial vendors. If we go to commercial, it adds a whole other element. And we talked about proliferation; there were four other companies.

THE COURT: What were the things that the commercial people wanted?

THE WITNESS: It is the amount of the boxes. I think there were four companies now that were deemed commercial that were not part of this group, they were out on the street now, and if this is ruled legal, I think there may be many more companies that feel they could now in effect be in the public right-of-way.

THE COURT: Any reason why you can't put a limit? There is only so much space Downtown.

THE WITNESS: Right now we have nine or ten commercial papers Downtown and there were four that were deemed to be commercial, so that is up to fourteen all ready. And if we had more, then those guidelines, I think, would have to be redrafted to consider the numbers because -

[p. 152] THE COURT: Suppose you did draft the guidelines and, forgetting about whether it is commercial or non-commercial, but you'd only allow so many boxes on the street. You only allow so many parking spaces on the street.

THE WITNESS: I think even from the pictures this morning it depicted our guidelines call for a maximum of six in one location. We have some like that already, so obviously if you add more, then it's going to become first come, first serve, and you may preclude the

normal newspapers from being in prime locations. We're dealing with an area of 13-foot sidewalks in a very concentrated area of the Downtown that's -

THE COURT: Newspapers are already there; aren't they?

THE WITNESS: Yes, they are.

THE COURT: So isn't it sort of first come, first serve?

THE WITNESS: Well, the way it's working now, the committee is agreeing collectively how the order of each row goes.

THE COURT: Except you're leaving the commercial folks out.

THE WITNESS: Yes, sir. I'm saying then proliferation -

THE COURT: You're going around in circles here.

THE WITNESS: Well, I think the numbers will increase [p. 153] tremendously if the commercial folks are included; therefore, the guidelines have to be re-thought in terms of numbers and there'll have to be some thinking to decide where each one goes.

THE COURT: You heard somebody testify about how they do it out in San Francisco. Have you investigated that?

THE WITNESS: I have seen those, yes.

THE COURT: What do you think of their system?

THE WITNESS: I think it works pretty well. In fact, that was our original intention when we did a streetscape, to provide a series of boxes that would be paid for by the public money to do that. At this point -

THE COURT: And then rent it to the people who wanted to use it?

THE WITNESS: Yes.

THE COURT: That would sort of take care of financing, I guess, the capital construction of the City. But the rent -

THE WITNESS: Right.

THE COURT: - would be the cost of the capital construction plus interest.

THE WITNESS: But that was not accepted in concept by the newspaper companies at this point, so it's been dropped as a concept and so that is why it's working the way it is.

THE COURT: Are the newspaper companies trying to [p. 154] keep them off?

THE WITNESS: No, I think they are working with everybody out there to achieve something everybody can agree on. But yes, I'm familiar with San Francisco and that's something we had investigated. The other issue is, again, through the City Engineer's Office, is the charging fees as to how many people they would need to regulate. And when you get into fees, it is a whole other issue.

THE COURT: Uh-huh, okay.

MR. MEZIBOV: A couple questions, Your Honor -

THE COURT: Go ahead.

MR. MEZIBOV: - if I might.

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. MEZIBOV:

Q. In answer to Mr. Yurick's question, is it accurate that you believe that newsracks detract from the City's streetscape in terms of esthetics?

A. As they currently exist in sporadic pattern just grouped wherever they want to be Downtown, yes.

Q. So is your testimony that generically any newsrack -

A. Not in itself, no.

THE COURT: You aren't concerned with what's inside it.

THE WITNESS: No.

THE COURT: You're concerned with the appearance of the box.

THE WITNESS: And the appearance of all the boxes collectively. I'm not saying a box is unattractive, no. Collectively, the way they are sporadically attached to wherever they want to be is unattractive.

Q. So if Discovery Center or Harmon would agree to allow their publications to be dispensed from a newsrack which you find to be esthetically pleasing and one which is allowed under a City regulatory scheme, you would have no problem from an esthetic standpoint as to their publication out there; would you?

A. Not in terms of the box design, but I would have a problem with the proliferation because we would end up with a lot more boxes than we have to deal with and the system would have to be changed to deal with that.

Q. Mr. Richardson, are you aware of any applicant seeking permission from the City to put a newsrack out on the City right-of-way who has been denied?

A. No, I'm not. I think that at this point I think it's been at least eighteen years since they have had this, and I think if that's changed, therefore, people will become aware they can be in the public right-of-way which they were not aware of now and it is advertising the public right-of-way. And if they were aware they cannot do that and if they are deemed that they [p. 156] can, I think many more may apply.

Q. Your testimony is, as I understand it, that if Discovery Center and Harmon are allowed to keep their newsracks out on the public right-of-way, that could send a message to everyone and anyone they could have newsracks out there?

A. It possibly could, yes.

Q. But notwithstanding the fact they have been out there a year, not one person, not one company has

applied for City permission, isn't that correct, who's been rejected?

A. Again, we don't deal with the permit process. I am not totally sure of that; but I don't know of any.

Q. You said you are concerned with proliferation. I want to know whether you're aware of any entities, businesses or individuals who have come to you seeking permission of the City to place their -

A. The City Engineer's Office again honchos the permit process. I do not. So no, I'm not aware of that; but there is existing four companies that had commercial boxes in the right-of-way now Downtown.

Q. And do I understand correctly that your proposed regulation, which is Trial Exhibit 3, would continue to permit newsracks to be out on the streetscape; is that correct?

A. Yes.

Q. So the City in no way contemplates doing away with -

A. No.

[p. 157] Q. with newsracks because it offends the City's esthetics -

A. No.

Q. - or City's safety?

A. We want to organize them like the other elements on the street.

Q. Do I understand from your testimony you always had a concern about accomplishing uniformity among the various news boxes?

A. I think you need a certain degree of uniformity in the nature that they don't block visual things for safety issues from a police standpoint and they don't block crosswalks and handicap ramps as we said this morning. On the other hand, you need a certain vitality. We need activity Downtown and activity at night, so there is something to say about the color variations and that kind of thing, too.

Q. In fact, the City has gone to the various publishers who have newsracks out on the City right-of-way now such as *The Enquirer* and *The Post* and you've made some suggestions to those people which you would like to incorporate into your streetscape and they have rejected them; have they not?

A. I think starting in 1979 we proposed what was talked about before, that we custom design a box that the newspapers would simply slip their papers into a box provided by the City.

Q. And that proposal was rejected by the newspapers?

[p. 158] A. Yes.

Q. Which newspapers?

A. That's sometime ago. It was again a collective group of all of them.

Q. And because the newspapers were unhappy with that scheme, you abandoned it?

A. Well, this issue has obviously been one of controversy from the beginning and I think we were trying to please everybody as a compromise position.

Q. You were trying to please the newspapers; weren't you?

A. We were also trying to please the City officials as well and the spirit of development Downtown.

Q. But it's accurate that when suggestions have been made by the City to the newspapers about accomplishing uniformity so as to satisfy the City's concerns about safety and esthetics, some of those recommendations which have involved the use of a uniform newsrack have been rejected by the newspapers?

A. Yes, and I think they also dropped some of their concerns and I think it's been a compromise.

Q. Is it fair to say the regulatory scheme of the City is in part a partnership with the newspapers -

A. Yes, sir.

Q. - of the City?

A. Definitely.

Q. So who is responsible for the operation and development of [p. 159] this regulatory scheme, the newspapers or the City in this town?

MR. YURICK: Objection.

THE COURT: Overruled. I think the witness is being sort of led down the path. You're not used to being in court.

A. Who is responsible, the administration of it, is the City Building Engineers of the Public Works Department.

Q. But they do consult from time to time with the newspapers about these regulations?

A. I would assume.

MR. MEZIBOV: That's all I have, Your Honor.

THE COURT: Thank you.

MR. YURICK: I have nothing further of this witness.

THE COURT: Thank you, Mr. Richardson.

(Witness excused.)

MR. YURICK: Mr. Young would be my next witness, Your Honor.

THE CLERK: You're still under oath.

THE COURT: Proceed.

THOMAS E. YOUNG

a witness herein, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Young, I think you already testified you're the City [p. 160] Engineer; isn't that correct?

A. That's correct.

Q. And what are your responsibilities and the responsibilities of your office with regard to public right-of-ways as a City Engineer?

THE COURT: Let me ask this question. How does the City Engineer relate and the City Architect relate to the Department of Public Works?

THE WITNESS: The Engineering Division which I head and the Architecture and Facility Management Division, of which Mr. Richardson is a senior official, are both divisions in the Department of Public Works.

THE COURT: Okay.

Q. Sir, let me ask you again: How does your office - how do the responsibilities of your office coincide with or how do they relate to the placement of newsracks in the public right-of-way? What are your office's concerns?

A. Well, our office has the basic function for design and regulation of use of the public right-of-way including streets, sidewalks, bridges, other structures within the right-of-way.

Q. And in your opinion, do these - do newsracks generally, or dispensing devices, whatever, do they detract from the safety of the public right-of-way?

A. They can if they are improperly positioned and if there are so many of them that, at a given location, that it forces [p. 161] improper positioning of them.

Q. And how specifically do they detract or can they detract from the safety of the public right-of-way?

A. At many locations they have been placed within or too close to crosswalks so that they could be bumped by pedestrians in the normal movement. In some cases they have obstructed the use of handicap ramps for wheelchair-bound persons. In some cases they have been positioned so that – and this doesn't apply to intersections with traffic signals but at some other locations where they could actually obstruct the visibility of motorists and pedestrians, either the pedestrian – either way, and particularly small pedestrians, children. There are many ways with which they can adversely effect safety.

Q. Do they in any way detract from the width or the adequacy of the width of the public right-of-way?

A. Again, if they are improperly placed, they can restrict the use of the sidewalk. As Mr. Richardson stated, that interference is minimized if they are placed in the area adjacent to the curb which is normally occupied by light poles, fire plugs, traffic signs and other utility and public functions.

Q. Okay. Going back to the discussion of your approval of – you approved Harmon's application to place these dispensing devices on the public right-of-way; is that correct?

A. Yes.

* * *

[p. 163] THE COURT: And you asked Mr. Young –

MR. YURICK: I asked him if he allowed or attempted to allow both of the publications an opportunity to be heard.

THE COURT: Overruled. You may answer.

A. Yes, they did have every opportunity to present their case.

Q. Okay. Did you, as a member of the Board, attempt to approach the appeal with an open mind?

A. Yes.

MR. YURICK: I don't have any further questions of this witness at this time.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. MEZIBOV:

Q. You've indicated, have you not, Mr. Young, in response to Mr. Yurick's questions, that newsracks may compromise or detract the City's interest with regard to safety if they are positioned improperly; is that correct?

A. Yes.

Q. The City has the ability to determine where a particular newsrack is to be positioned; isn't that correct?

A. In the sense of being able to reject a permit or to require, even after permit is issued, to require its relocation if it proves to be unsafe, yes.

Q. So, therefore, newsracks, insofar as positioning concerns [p. 164] are involved, can be regulated by the City; is that correct?

A. Yes.

Q. As a matter of fact, the City asks for site locations before approving a permit; isn't that correct?

A. At least the location by corner. We have accepted lists rather than individual site plans in some cases.

Q. And you also indicated a problem could develop if there were too many newsracks at a given location; is that correct?

A. That's correct.

Q. And would you agree with me that the City has the ability to regulate the number of newsracks which are located at a particular site?

A. I don't know that I'm legally competent to answer that question.

Q. As City Engineer, have you ever been asked to involve yourself in a decision as to how many newsracks should or could be located at a particular location?

A. I have and my staff have been involved in the discussion that Mr. Richardson has described with the various newspapers at which there apparently is, and I support, a tentative agreement there be no more than six on any one corner. If that number, however, were to limit the placement of a non-commercial publication, I can't answer what the legal aspects of that situation would be.

THE COURT: I don't think he is asking you the legal [p. 165] aspects. If you have got a application for a permit from somebody for a newsrack, you're not concerned with what the content - what is purveying in the news box; it might be a magazine, as opposed - say it might be questionable whether it is commercial or non-commercial: you could determine from the permit and the location whether it's going to be too many boxes at that location. You say, "No, you can't put it here, but

across the street," because at every intersection there are four corners and a crosswalk; at least two sides.

THE WITNESS: On some corners there are already that number of -

THE COURT: Well, then you -

THE WITNESS: - boxes.

THE COURT: Then suppose it was a newspaper that wanted to put one there and there are too many there: what would you do in that situation? Tell them "No?"

THE WITNESS: That would certainly be my recommendation.

THE COURT: Okay. Then you can recommend. I mean, that you can regulate it, I would think, because your recommendation carries a lot of weight and a permit is not going to be granted without your approval; is it?

THE WITNESS: Well, I can be overruled.

THE COURT: Who would overrule you? Mr. Rowe?

THE WITNESS: Potentially a Director of Public Works, [p. 166] a City Manager, or City Council have that authority.

THE COURT: Okay. Well, I guess that is a chance everybody can take.

THE WITNESS: Sure.

THE COURT: But I think -

THE WITNESS: I'm not -

THE COURT: - they are going to listen to who they hired to do the job.

THE WITNESS: I'm not unwilling to listen to the suggestion.

THE COURT: If you thought it was too crowded, you would deny it or reject the permit; is that correct?

THE WITNESS: Yes.

THE COURT: Okay.

Q. By the way, Mr. Young, have you ever been overruled with regard to a recommendation you made concerning either the issuance or a revocation of a newsrack permit?

A. Subject to the outcome of this litigation, no.

Q. I'm not talking about overruled by a federal judge. I'm talking about someone within the City.

A. No.

Q. No. And is it accurate, Mr. Young, that since 1989 only two publications have requested approval to place their newsracks in the City right-of-way?

A. No, that is not accurate. There are also the Christian [p. 167] Singles publications.

Q. And -

A. That's four publications within the year essentially.

Q. And clearly no applications have been made in calendar year 1990; have they?

A. That's correct.

Q. By anyone?

A. That's correct.

Q. And you also indicated, in getting back to your concerns, that perhaps newsracks might detract from the City's safety concerns. You're not aware that the newsracks maintained by Harmon or Discovery have occasioned any safety problems; are you?

A. No more than any others.

Q. And the answer to that is, there are none; is that correct?

A. Well, there have been cases of newsracks placed at improper locations which in general the publishers have been cooperative in -

THE COURT: When you say "improper locations," are those locations where permit had been granted a newsrack for somewhere else and instead of the northwest corner where you granted the permit, they put it on a southeast corner?

THE WITNESS: More -

THE COURT: Is that what you mean?

[p. 168] THE WITNESS: More likely on the northwest corner but too close to the crosswalk or apparently obstructing the crosswalk or something of that nature.

THE COURT: Okay.

Q. And the City has the power then to require -

THE COURT: Isn't there a City ordinance about obstructing crosswalks, obstructing intersections and things like that? Aren't there other laws that say people can't do that? You give them a permit and say, "You can put something in a particular location;" they put it in that location, but they put it somewhere where it does obstruct. They would be violating the ordinance and you can order them to remove that?

THE WITNESS: I think that is the basis for which we requested repositioning and have generally gotten cooperation.

THE COURT: So you have been able to regulate those things?

THE WITNESS: Yes.

Q. Let me understand, Mr. Young, that as City Engineer you're involved with primarily safety concerns as they grow out of structures on or about the public right-of-way; is that correct?

A. That is a major part of our work but not the only one, as evidenced by this situation.

Q. I mean, as a City Engineer, what is your training which has allowed you to become the City Engineer, professional [p. 169] training?

A. I'm a civil engineer [sic] by professional background, registered civil engineer [sic] in the State of Ohio, and much of my previous experience was as City

Traffic Engineer, as the Honorable Judge has noted, and so safety of pedestrians and motorists has been a matter of prime concern throughout my career.

Q. How do those concerns in anyway depend upon a determination of whether or not a particular publication is commercial or non-commercial in nature?

A. Only again in the matter of proliferation. It has been made clear to us that we do not have the authority to prohibit the placement of non-commercial publications except as respect to specific safety problems. The matter of proliferation is a great concern because there is a finite amount of space where devices of this or any other dispensing type can be placed on the sidewalks, particularly in the Downtown area, but this applies to other areas as well. And we have - I have great difficulty in determining how we could effectively regulate a situation in whichever retail store decides that placing their advertisement folders on the sidewalk on a - perhaps in front of their own store but perhaps somewhere else - could be effectively regulated for the safety and convenience of the public.

THE COURT: Is it your position that if I find that [p. 170] this ordinance, applied in this particular case as it presently exists, is for some reason or another unconstitutional, that your concern is that every retail establishment on the skywalk and on the street level would have a right to put out sign boards along the street? That that would be - by such a decision, that we would be precluding the City from regulating the use of the right-of-way?

THE WITNESS: I'm not sure about sign boards, but in terms of printed publications – for example, the Lazarus – and I use this simply as a sample example –

THE COURT: Sure.

THE WITNESS: – as it now appears in the Sunday paper, I see nothing to prevent Lazarus from placing this publication out on the sidewalk if the – if your ruling is that this process, this regulatory process, is unconstitutional. Historically, the City has prohibited commercial advertising on the public right-of-way. We recognize that the newspapers or general circulation are a separate and distinct classification even though they do contain certainly advertising.

Q. Mr. Young, isn't it accurate that the Lazarus publication which you just commented on is in fact on the City sidewalk every day?

A. Not unless it's dropped there as litter.

Q. Isn't it distributed by means of *The Cincinnati Enquirer* [p. 171] or through the newsracks on the City right-of-way?

A. Yes, but that doesn't take an additional dispensing device.

Q. Have you ever considered asking *The Cincinnati Enquirer* to remove from its publication all of the matters which you would otherwise consider purely commercial in nature?

A. I don't think that question is one that can be answered. Of course the answer is no.

Q. And my question to you is, why not if you're seeking to prevent the distribution of commercial matter on public streets by means of newsracks?

A. Because, as I have stated, it has been made clear to us that newspapers, including their advertising content, have a special status that is essentially inviolate.

Q. Do the newspapers have a special status to distribute advertising for Lazarus's magazine that other publishers do not have?

MR. YURICK: I'll object to that.

THE COURT: No, I'm going to let – Mr. Young's handling himself very well. Overruled.

A. Would you repeat the question, sir?

Q. Does *The Cincinnati Enquirer* have a special status to distribute Lazarus's commercial publication?

A. It is my understanding that it does.

Q. Would it change the character of *The Cincinnati Enquirer* [p. 172] if you required that particular publication to devoid itself of all commercial matter including publications promoting Lazarus, information containing what's playing at the movies, information about what time the Reds' game starts and how much the tickets cost and how and where I can buy an automobile? Would that change the character of that publication?

A. Indeed it would.

Q. So a newspaper is more than just editorials and news; is that correct?

A. That's correct.

Q. Then how do you make a distinction about what constitutes commercial and what constitutes non-commercial if a newspaper is by its very nature a vehicle to convey commercial information?

A. We go back to the guideline which says predominantly news or -

THE COURT: I think it's Exhibit 2.

A. - publications primarily presenting coverage of, and commentary on, current events daily or weekly publications.

Q. Mr. Young, if I go to a newsrack and I put in a buck and a quarter on a Sunday to purchase *The Enquirer*, the only reason I have done so is because I'm interested in its real estate ads, is that paper, as far as I'm concerned, primarily devoted to editorial and news, or is it primarily devoted to realty?

A. Your interest in the paper in one section of the paper [p. 173] certainly doesn't change the nature of the paper.

Q. Says who? Where does it say that in the City code?

A. I think that's a question that stands on its - an answer that stands on its face. The fact you're interested in only one part of the newspaper doesn't change the fact that the newspaper is what it is.

Q. Have you ever gone through *The Cincinnati Enquirer* or any of the publications which you find no

problem with insofar as being distributed by newsracks to determine what is the percentage of advertising to news coverage?

A. No, I haven't.

THE COURT: Well, I think the answer - this is a debate that could go on *ad infinitum*. I think one of the considerations is if the City would dictate to the newspapers what could be included in their newspapers that are used at racks in the nature of advertising material like Lazarus's magazines, K-Mart and all the rest that are attached in the Sunday papers, if the newspaper would not be permitted to do that, it might not be able to acquire the advertising dollars of those advertisers which may have some bearing on their ability to collect the news and purvey the news, so it seems to be interrelated. I don't think it is an easy question or there is any easy answer to it. I think I understand the problem in this case and it looks sort of simple to begin with, but the more you dig into it, the more difficult it becomes.

* * *

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No. 91-1200

APR 23 1992
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In The
Supreme Court of the United States
October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

**JOINT APPENDIX
VOLUME II, PAGES 206-405**

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EXHIBIT 1

AMENDED REGULATION NO. 38

In accordance with Section 911-17 of the Cincinnati Municipal Code, the following rules and regulations are promulgated in regard to the dispensing of newspapers of general circulation from devices located within the Public Right-of-Way.

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. The site plan must show all existing street furniture including other newspaper dispensing devices. The site plan shall be of such scale and detail to allow the reasonable determination of pedestrian obstruction, aesthetics, driver sight distance and any other factor influencing the public safety. The method of attachment of each newspaper device to the sidewalk, post or other fixed object shall be depicted on the site plan. Where attachment is impracticable, an explanation of same is required. The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the device. Approval or denial must be determined within five business days. A request to place newspaper vending device in the public right-of-way and site plan shall be in the form attached hereto as Exhibit A. The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection. Such objection shall be heard by the City Manager or his designee.

A site plan is not required for devices in place as of the date of this Amended Regulation.

2. All persons, partnerships or corporations operating newspaper vending devices must provide the City Manager or his designee with a location inventory of such devices located within the public right-of-way. The location inventory must be updated yearly in July. Such inventory need not consist of a listing of locations, depiction on a street plat is acceptable. The initial inventory shall not be required until October 1, 1984. All devices must meet the site plan criteria as out-lined in item #1 above.
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems.
4. Each newspaper vending device shall be maintained and kept in good repair at all times. The owner/operator of newspaper dispensing devices within the public right-of-way shall have on file with the City Manager or his designee proof of current comprehensive liability insurance covering the newspaper dispensing devices they own. Compliance with this provision shall occur on or before July 17, 1984.
5. No advertising media shall appear on newspaper dispensing devices located within the public right-of-way except for the name and price of the publication, and promotion of the publication itself or written articles contained therein.
6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person, a representative who can be reached during usual business hours, with the City Manager or his designee. This contact person shall be

able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

7. If, upon written notification or such other method of notification consistent with an emergency or critical situation, the owner/operator of a newspaper dispensing device fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the offending dispensing device shall be removed from the right-of-way and the owner/operator shall be billed for the cost of the removal and storage of the device. In all non-emergency situations, the owner/operator shall have five business days to request an opportunity to object to the order to remedy violations. The objection of the owner/operator shall be heard within five business days of the request. Such objection shall be heard by the City Manager or his designee.

Approved:

/s/ Sylvester Murray
Sylvester Murray

Dated: June 1, 1984

EXHIBIT 2**EXHIBIT A****REQUEST TO PLACE NEWSPAPER VENDING
DEVICE IN PUBLIC RIGHT-OF-WAY**

-
1. *Owner of newspaper vending device*
DISCOVERY NETWORK, INC., dba DISCOVERY CENTER
 2. a. *Name of Responsible Contact*
Margaret M. Moertl
 - b. *Address*
1700 Madison Road, Cincinnati, OH 45206
 - c. *Telephone Number*
513/221-6800
 3. *Publication being distributed*
DISCOVERY CENTER MAGAZINE
 4. *Date vending device to be placed*
2/20/89
 5. *Location of vending device by street address*
(list of precise [sic] locations is attached).
 6. *Diagram of the location (i.e., intersection or corner) where device is to be placed*

Dated February 17 , 1989

/s/ Margaret M. Moertl
Authorized Representative
of Owner

CERTIFICATE OF INSURANCE

ISSUE DATE (MM/DD/YY)
(ILLEGIBLE)

PRODUCER

LINCOLN ASSOCIATES, LTD.
188 Industrial Dr., Suite 226
Elmhurst, IL 60126
(312) 833-0900

INSURED

Discovery Center, Inc.
2930 N. Lincoln Ave.
Chicago, IL 60657

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

COMPANIES AFFORDING COVERAGE

COMPANY LETTER A Aetna Casualty

* * *

COVERAGES

THIS IS TO CERTIFY THAT POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS

CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS, AND CONDITIONS OF SUCH POLICIES.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	GENERAL LIABILITY	
X	<u>X</u> COMPREHENSIVE FORM	MI 5050525 CCI and renewal
	<u> </u> PREMISES OPERATIONS	
	<u> </u> UNDERGROUND EXPLOSION & COLLAPSE HAZARD	
	<u> </u> PRODUCTS COMPLETED OPERATIONS	
	<u> </u> CONTRACTUAL	
	<u> </u> INDEPENDENT CONTACTORS	
	<u> </u> BROAD FORM PROPERTY DAMAGE	
	<u> </u> PERSONAL INJURY	
	<u> </u>	
POLICY EFFECTIVE DATE (MM/DD/YY)		POLICY EXPIRATION DATE (MM/DD/YY)
02/05/88		02/05/89
02/05/89		02/05/90

LIABILITY LIMITS IN THOUSANDS

	EACH OCCURRENCE	AGGREGATE
BODILY INJURY	\$ <u> </u>	\$ <u> </u>
PROPERTY DAMAGE	\$ <u> </u>	\$ <u> </u>
BI & PD COMBINED	\$500	\$500
PERSONAL INJURY	* * *	\$ <u> </u>

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLE/SPECIAL ITEMS

Liability extends to placement of newspaper vending machines.

CERTIFICATE HOLDER

City Manager
City of Cincinnati
801 Plum Street
Cincinnati, Ohio 45202

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE /s/ Martin E. Shaw

Martin E. Shaw, CLU

EXHIBIT 3
EXHIBIT "A"

REQUEST TO PLACE NEWSPAPER VENDING DEVICE
IN PUBLIC RIGHT-OF-WAY

1. *Owner of Newspaper vending device:*
Harmon Publishing Co., Inc.
2. *Name of Responsible Contact:*
 - a. Robert Blankemier
 - b. 5807 Hawthorn Avenue
Cincinnati, Oh 45227
 - c. 513-271-6797 or
1-800-678-2244
3. *Publication being sold:*
Homes Magazine
4. *Date vending device to be placed:*
July 26, 1989
5. *Location of vending device by street address:*
See enclosed list.
6. *Diagram of the location (i.e., intersection or corner) where device is to be placed:*
See enclosed map.

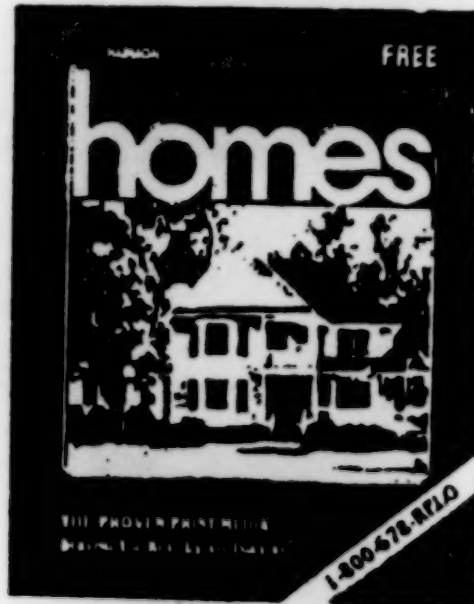
Date: July 13 , 1989 /s/ Robert Harmelink
Robert Harmelink
Authorized Representative
of Owner

EXHIBIT A
PROPOSED STREET BOX LOCATIONS -
CINCINNATI, OHIO

Walnut & 7th	S. E. Corner
Walnut & 6th	S. E. Corner
Walnut & 5th	N. E. Corner
Walnut & 4th	N. W. Corner
Main & 4th	N. W. Corner
Main & 5th	S. W. Corner
Main & 6th	S. E. Corner
Main & 7th	S. W. Corner
Vine & 4th	N. W. Corner
Vine & 5th	S. W. Corner
Vine & 6th	N. E. Corner
Vine & 7th	S. E. Corner
Vine & Court	N. E. Corner
Race & 4th	N. W. Corner
Race & 5th	S. E. Corner
Race & 7th	N. W. Corner
Broadway & 5th	N. W. Corner
Broadway & 6th	S. W. Corner
Broadway & 8th	N. W. Corner
Broadway & Eggleston	N. W. Corner

Sycamore & 6th
Sycamore & 7th
Elm & 5th
Sentinel & 6th
W. 5th Street

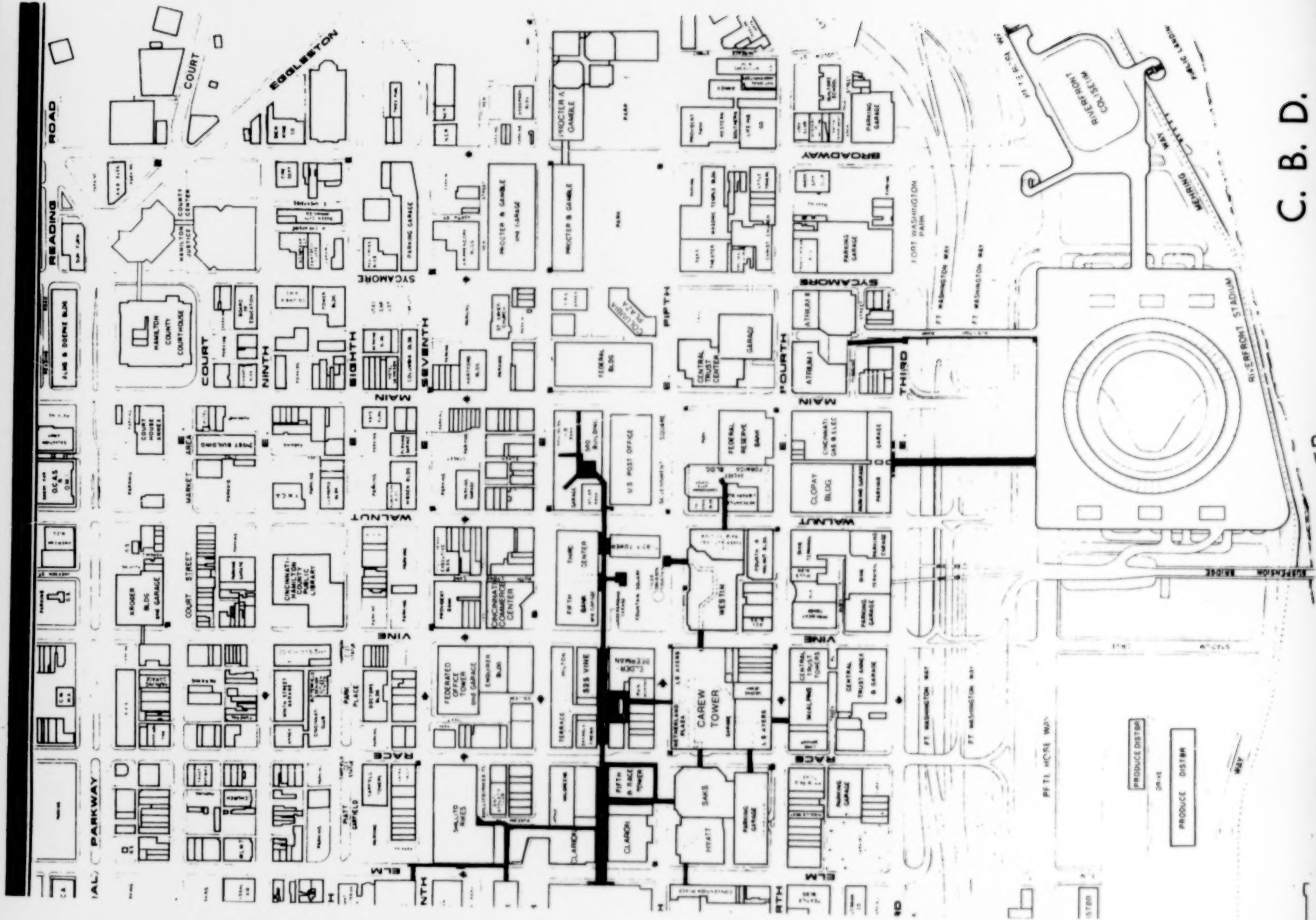
S. E. Corner
S. E. Corner
N. E. Corner
S. W. Corner
Front of Westin
Hotel



BOB HARMELINK
Regional Distribution Manager

1-800-678-2244 or 216-453-1700
401 Market Ave. N., Canton, Ohio 44702

156



C. B. D.

acord CERTIFICATE OF INSURANCE

ISSUE DATE (MM/DD/YY)

March 16, 1987

PRODUCER

RBC Associates, Inc.
600 Frank E. Rodgers Blvd.
Harrison, NJ 07029

INSURED

Harmon Publishing, Division of
Hartz Mountain Corporation
700 Frank E. Rodgers Blvd.
Harrison, NJ 07029

THIS CERTIFICATE IS ISSUED AS A MATTER OF
INFORMATION ONLY AND CONFERS NO RIGHTS
UPON THE CERTIFICATE HOLDER, THIS CERTIFI-
CATE DOES NOT AMEND, EXTEND OR ALTER THE
COVERAGE AFFORDED BY THE POLICIES BELOW.

COMPANIES AFFORDING COVERAGE

COMPANY LETTER A Continental Casualty Company

COMPANY LETTER B Transportation Insurance Com-
pany

* * *

COVERAGES

THIS IS TO CERTIFY THAT POLICIES OF INSURANCE
LISTED BELOW HAVE BEEN ISSUED TO THE INSURED
NAMED ABOVE FOR THE POLICY PERIOD INDI-
CATED. NOTWITHSTANDING ANY REQUIREMENT,

TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS, AND CONDITIONS OF SUCH POLICIES.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	GENERAL LIABILITY	
A	<u>X</u> COMPREHENSIVE FORM	CCP 4007411058
	<u>X</u> PREMISES OPERATIONS	
	<u>X</u> UNDERGROUND EXPLOSION & COLLAPSE HAZARD	
	<u>X</u> PRODUCTS/ COMPLETED OPERATIONS	
	<u>X</u> CONTRACTUAL	
	<u>X</u> INDEPENDENT CONTACTORS	
	<u>X</u> BROAD FORM PROPERTY DAMAGE	
	<u>X</u> PERSONAL INJURY	
	<u>X</u> _____	
POLICY EFFECTIVE DATE (MM/DD/YY)		POLICY EXPIRATION DATE (MM/DD/YY)
6/17/89		6/17/90

LIABILITY LIMITS IN THOUSANDS

	EACH OCCURRENCE	AGGREGATE
BODILY INJURY	\$ _____	\$ _____
PROPERTY DAMAGE	\$ _____	\$ _____
BI & PD COMBINED	\$1,000	\$1,000
PERSONAL INJURY		\$ _____

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	AUTOMOBILE LIABILITY	
A	<u>X</u> ANY AUTO	BUA 0007411041- TX
	<u>X</u> ALL OWNED AUTOS (PRIV. PASS.)	
	<u>X</u> ALL OWNED AUTOS (OTHER THAN PRIV. PASS.)	BUA 6007411043- HI, KS, MA, NJ, NY, PR, VA.
	<u>X</u> HIRED AUTOS	
	<u>X</u> NON-OWNED AUTOS	BUA 3007411053
	<u>X</u> GARAGE LIABILITY	
	<u>X</u> _____	
POLICY EFFECTIVE DATE (MM/DD/YY)		POLICY EXPIRATION DATE (MM/DD/YY)
6/17/89		6/17/90
6/17/89		6/17/90
6/17/89		6/17/90

LIABILITY LIMITS IN THOUSANDS

	EACH OCCURRENCE	AGGREGATE
BODILY INJURY PER PERSON	\$ _____	\$ _____
BODILY INJURY PER ACCIDENT	\$ _____	\$ _____
PROPERTY DAMAGE	\$ _____	\$ _____
BI & PD COMBINED	\$1,000	
BI & PD COMBINED	\$ _____	\$ _____

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	EXCESS LIABILITY	
	____ UMBRELLA FORM	
	____ OTHER THAN	
	____ UMBRELLA FORM	
B	WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY	WC 8007411039
	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)
	6/17/89	6/17/90

LIABILITY LIMITS IN THOUSANDS

STATUTORY

\$500, (EACH ACCIDENT)

\$500, (DISEASE-POLICY LIMIT)

\$500, (DISEASE-EACH EMPLOYEE)

OTHER

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLE/SPECIAL ITEMS

Including Additional Insured Vendors Coverage. All Lessors included as Additional Insured as Interest may appear. Machines placed on street corners of Cincinnati.

CERTIFICATE HOLDER

City of Cincinnati, Ohio
City Hall, Room 440
801 Plum Street
Cincinnati, Ohio 45202

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 60 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE /s/ Illegible

EXHIBIT 4

City of Cincinnati

[SEAL]

Department of Public Works Room 440, City Hall
 Division of Engineering 801 Plum Street
 Cincinnati, Ohio 45202

George Rowe
Director

Thomas E. Young
City Engineer

July 21, 1989

Permission is hereby granted to Harmon Publishing Company, Inc., 401 Market Avenue North, Canton, Ohio 44702, to place newspaper vending devices at various locations throughout the City. A list of these locations are attached.

Harmon Publishing Company shall notify the Police at (513) 352-3511 of their intentions before beginning work under this permit.

It is understood by Harmon Publishing Company and the City that the Owner of the newspaper vending devices assumes all responsibility for the safety of passing pedestrians and motor vehicles with respect to placement of the devices and shall take suitable precautions to insure the protection of the Public.

All work done shall be in compliance with all laws and ordinances of the City of Cincinnati and shall involve no expense or cost of liability to the City of Cincinnati.

The said Harmon Publishing Company agrees to the terms and conditions mentioned above and guarantees to save the City of Cincinnati free from all damages and claims arising from any work done thereunder.

T.E. Young, P.E.
 City Engineer

TEY: RWG

cc: R. Goldsmith, ETS
 Adm. File
 TEY/Eng. File

EXHIBIT 5
USA TODAY

Logo

August 23, 1989

Mr. George Rowe
Director
The City of Cincinnati
Public Works Department
801 Plum Street, Room 450
Cincinnati, Ohio 45202

Dear Mr. Rowe:

In accordance with Section 911-17 of The Cincinnati Municipal Code and Amended Regulation No. 38, enclosed please find an updated location inventory (revised August 1989) for our newspaper vending machines located within the public right of way.

The enclosed item is being submitted under protest and USA TODAY and our affiliates hereby reserve our right to challenge the applicable ordinances and regulations and reserve our right to exercise our constitutional or other legal rights or privileges [sic] to publish and distribute newspaper publications or related items to the public.

Sincerely,

/s/ Ron Jackson
Ron Jackson
General Manager

RJ/je

enclosure

cc: Office of The City Manager
Mike Keating - Graydon, Head & Ritchey

617 Main Street	Central Pkwy & Vine SE
629 Walnut Street	8th & Walnut NW
549 Broadway Street	8th & Walnut NE
6th & Broadway	7th & Walnut NE
630 Main Street	7th & Walnut NW
6th & Sycamore SE	35 East 7th Street
622 Sycamore	7th & Main NW
6th & Sycamore NW	7th & Main SE
6th & Sycamore SW	8th & Main NE
217 West 7th	8th & Main SE
7th & Elm SW	9th & Main NE
7th & Elm SE	916 Main Street
8th & Elm Street	Central Pkwy & Main SE
9th & Elm SE	125 E. Court
9th & Elm NE	1001 Main Street
9th & Central	1201 Sycamore
Elm & Court	1000 Sycamore
Race & Central NW	230 E. 9th Street
Race & Garfield SW	800 Broadway
Race & Garfield NE	St. Gregory & Pavillion
700 Race NE	1077 Celestial
7th & Race SE	Riverfront Drive Ramp N
7th & Race SW	Riverfront Stadium
643 Vine Street	Riverfront Ticket Window
7th & Vine SE	Pete Rose Way Walkway
719 Vine Street	Pete Rose & Plum
8th & Vine SE	3rd & Plum NE
8th & Vine NW	3rd & Elm NE
19 Garfield Place	3rd & Race NE Corner
9th & Vine SE	3rd & Race NE
Central & Vine NE	309 Vine Street
Court & Vine SE	4th & Vine NW

Court & Vine NE	4th & Vine NE
Court & Vine NW	4th & Vine SE
4th & Vine SW	5th & Elm NW
5th & Vine SE	435 Elm St. 2nd Floor
5th & Vine SW	Greyhound Bus Terminal
5th & Vine NW	E. 3rd & Main Street
21 E. 5th Street	139 E. 4th Street
Vine Opera Place	E. 4th & Main
6th & Vine SE	223 E. 4th Street
6th & Vine NW	4th & Main NE
6th & Vine NE	4th & Main NW
617 Vine Street	128 E. 4th
626 Vine Street	125 E. 4th
6th & Race NE	4th & Main SW
6th & Race SE	5th & Main SE
535 Race Street	5th & Main NE
511 Race Street	5th & Main NW Post Office
508 Race Street	5th & Main SW
550 Race Street	550 Main Street
5th & Race SE	6th & Main NE
1623 Dalton St. #1	216 E. 6th
5th & Race Netherland Plaza	6th & Main SE
30 W. 5th Street	515 Main Street
5th & Race NE	132 E. 6th Street
5th & Race SW	601 Main Street NW
13 W. 4th Street	6th & Walnut SE
4th & Race NW	110 E. 6th
4th & Race SE Corner	6th & Walnut NE
4th & Race SW	6th & Walnut NW
201 W. 4th Street	24 E. 6th
231 4th Street	49 E. 6th

5th & Plum SE	6th & Walnut SW
5th & Elm SW Corner	5th & Walnut SE
151 W. 5th Street	121 E. 5th Street
Clarion Hotel	5th & Walnut NE
5th & Walnut NW	2069 Beechmont Avenue
5th & Walnut SW	61 Campus Avenue
425 Walnut Street	7710 Reading Road
E. 4th & Walnut SE	7655 Reading Road
E. 4th & Walnut NE	7648 Reading Road
4th & Walnut NW	7500 Reading Road
28 E. 4th Street	70th Vine SW
18 E. 4th Street	Spring Grove & June
15 E. 4th Street	5115 Vine Street
4th & Walnut SW	Hamilton & Spring Grove
4th & Broadway SE	4145 Apple
E. 4th & Broadway	5216 Glenway
400 Pike Street	4840 Glenway
3rd & Pike	619 Oak Street
One Lytle Place	930 E. McMillan
5th & Broadway SE	1026 E. McMillan
5th & Sycamore NW	E. McMillan
5th & Sycamore SE	1115 E. McMillan
4th & Sycamore SW	2139 Auburn Avenue
4th & Sycamore NE	27 Calhoun
537 Pete Rose Way	263 Calhoun Street
285 Pete Rose Way	267 Calhoun Street
110 Eggleston Road	Calhoun Resident Hall
1623 Dalton St. #2	Calhoun Rax
3400 Burnett Avenue	3850 Elland
3850 Elland	
(Children's Hosp.)	210 Elland Cir.

3850 Elland
 (Children's Hosp.)
 3000 Vine Street
 2600 Vine Street
 3514 Edwards
 2701 Erie Avenue
 2719 Erie Avenue
 2736 Erie Avenue
 442 Ludlow

3400 Burnett Avenue
 3333 Vine Street
 2600 Vine-across from Frischs
 3000 Vine Street
 Vine & Charlton
 2600 Vine Street
 Clifton & Ludlow NE
 Ludlow & Telford NW

EXHIBIT 6

City of Cincinnati

[seal]

Scott Johnson
 City Manager

Office of the City Manager

February 7, 1990

Honorable Mayor and Members of City Council

Re: Item #7-2 on 11/22/89 Council Calendar

Council at its session on Wednesday, November 22, 1989
 referred to me and the Law Committee, for consideration
 and report:

A motion by Mr. Mann, dated 11/22/89, that
 newsracks for the distribution of magazines,
 newspapers, and the like, be barred from the
 public streets and sidewalks where the publica-
 tion's content is predominantly (more than 90%)
 advertising.

In response to the motion, please note that Section 714-23
 of the Cincinnati Municipal Code prohibits the distribu-
 tion of commercial handbills in any public place. Section
 714-1-C defines commercial handbill to mean any printed
 matter that advertises merchandise or other things for
 sale or promotes an activity by sales. Administrative Reg-
 ulation No. 38 establishes an approval process for dis-
 pensing newspapers from devices located within the
 public right-of-way.

There are publications now appearing in devices in the public right-of-way which violate the preceding requirements of the Cincinnati Municipal Code. I am directing the Public Works Department to provide notice to the owners of the devices to remove them by a specific date. The owners will be provided an opportunity for an administrative hearing if they request one (similar to a Section 721-155 hearing).

I am directing the Public Works Department to limit approvals under Administrative Regulation No. 38 to daily or weekly publications primarily presenting coverage of, and commentary on, current events. They should contact the Solicitor's office if they have a question about the approval of a particular publication.

APPROVED FOR SUBMISSION TO CITY COUNCIL:

Scott Johnson
City Manager

EXHIBIT 7
The Greater Cincinnati
BUSINESS RECORD

Suite 1500 • Thirty-six East Seventh Street •
Cincinnati • Ohio 45287 • (512) 721-9300

February 9, 1990

Ms. Letty C. Reifel
Engineering Technical Support
CITY OF CINCINNATI
Room 440, City Hall
801 Plum Street
Cincinnati, Ohio 45202

Dear Ms. Reifel:

In accordance with Section 911-17 of the Cincinnati Municipal Code and amended regulation number 38, please find enclosed a location inventory of the vending boxes for **The Greater Cincinnati Business Record**. Also enclosed is a copy of our liability insurance covering these vending boxes.

In case you have any problems or questions, you can contact me or Suzanne Adelson at:

The Greater Cincinnati Business Record
36 East Seventh Street
Suite 1500
Cincinnati, Ohio 45202
(513) 421-9300

I look forward to hearing from you with your approval of this letter.

Best regards,

/s/ Jane V. Rogers
Jane V. Rogers
Vice President
Director of Marketing

JVR:sa

Encls.

Logo

THE GREATER CINCINNATI BUSINESS RECORD
VENDING LOCATIONS

1. Clifton
 - a. Vernon Manor
 - b. Zino's
 - c. Graeters
 - d. Columbia S & L
 - e. Steak & Eggs
2. Mt. Adams - Pavilion & St. Gregory
3. Lunken Field
4. Mt. Washington - Krogers
5. Mariemont - Krogers
6. Mt. Lookout
 - a. My Sister's Place
 - b. Subway
7. Hyde Park
 - a. JB Winberries
 - b. Echo Cafe
 - c. Servatii's
 - d. Krogers

8. Blue Ash
 - a. Kenwood Square North
 - b. Krogers
 - c. Skyline
 - d. Metro Restaurant
9. Montgomery Road
 - a. Krogers
 - b. La Peep
 - c. Skyline
10. Tri-county - Barlycorn's
11. 9th & Central - Busken's
12. 7th Street
 - a. & Race St.
 - b. & Vine St.
 - c. & Walnut St.
13. 6th Street
 - a. & Sycamore St.
 - b. La Rosa's
 - c. Red Squirrel
 - d. Hallmark
 - e. Murray Bros
 - f. Commerce Center
14. 5th Street
 - a. Clarion
 - b. Hyatt
 - c. Omni
 - d. Westin
 - e. Walgreens
 - f. Chiquita Center

15. 4th Street
 - a. Queen City Club
 - b. Wendy's
 - c. Federal Reserve
 - d. Gateway
 - e. Provident
 - f. Central Trust
 - g. Huntington Bank
 - h. & Plum St.
16. Elm Street
 - a. Convention Center
 - b. Egg Cetera - Skywalk
17. Race Street
 - a. Getz
 - b. Sak's
 - c. Henry Harris (Closson's)
18. Vine Street
 - a. Carew Tower
 - b. 525
 - c. Cincinnati
 - d. Skyline
 - e. Benjamin's
19. Walnut Street
 - a. Post Office
 - b. Du Bois
 - c. Florsheim
20. Main Street
 - a. Atrium I
 - b. Central Trust
 - c. Federal Bldg - 5th St.
 - d. Federal Bldg - 6th St.
 - e. Gianciola's

21. Sycamore - Atrium II
 22. Garfield Place
 23. Montgomery Boathouse
-

EXHIBIT 8

City of Cincinnati

[SEAL]

 Department of Public Works

March 8, 1990

Mr. Robert Harmelink
 Harmon Publishing Company
 401 Market Avenue North
 Canton, Ohio 44702

Re: 'Homes' Publication Newsracks

Dear Mr. Harmelink:

During the City of Cincinnati Council meeting held on February 7, 1990, a motion was passed, in relation to newracks, directing the Department of Public Works to enforce Cincinnati Municipal Code 714-23, 'Posting Notices Prohibited', which prohibits the distribution of commercial handbills in any public place. Section 714-1-C defines commercial handbills to mean any printed matter that advertises merchandise or other things for sale or promotes an activity by sales.

The previous newspaper rack regulations do not supersede any previous Codes and therefore material distributed in the right-of-way must conform to established guidelines, i.e. daily or weekly publications primarily presenting coverage of, and commentary on, current events.

According to these guidelines, your publication has been determined to be an advertising publication or commercial handbill and cannot be legally distributed from racks

in the right-of-way. Therefore, your permit to allow placement of dispensing devices in the right-of-way is revoked and you are hereby notified to remove all dispensing machines from the City owned right-of-way within 30 days of this notice.

If you wish to schedule an administrative hearing, please submit your request in writing to Ms. Letty C. Reifel, Engineering Technical Support, City Hall, 801 Plum Street, Cincinnati, Ohio 45202.

Very truly yours,

/s/ T. E. Yong
 for George Rowe
 Director of Public Works

EXHIBIT 9

City of Cincinnati

[SEAL]

Department of Public Works Room 450, City Hall
 801 Plum Street
 Cincinnati, Ohio 45202

 George Rowe, P.E.
 Director of Public Works

March 8, 1990

Margaret M. Moertl
 Discovery Network, Inc.
 1700 Madison Road
 Canton, Ohio 45206

Re: 'Discovery Center' Publication Newsracks in Right-
 of-Way

Dear Ms. Moertl:

During the City of Cincinnati Council meeting held on February 7, 1990, a motion was passed, in relation to newsracks, directing the Department of Public Works to enforce Cincinnati Municipal Code 714-23. 'Posting Notices Prohibited', which prohibits the distribution of commercial handbills in any public place. Section 714-1-C defines commercial handbills to mean any printed matter that advertises merchandise or other things for sale or promotes an activity by sales.

The previous newspapers rack regulations do not supersede any previous Codes and therefore material distributed in the right-of-way must conform to established guidelines, i.e. daily or weekly publications primarily presenting coverage of, and commentary on, current events.

According to these guidelines, your publication has been determined to be an advertising publication or commercial handbill and cannot be legally distributed from racks in the right-of-way. Therefore, your permit to allow placement of dispensing devices in the right-of-way is revoked and you are hereby notified to remove all dispensing machines from the City owned right-of-way within 30 days of this notice.

If you wish to schedule an administrative hearing, please submit your request in writing to Ms. Letty C. Reifel, Engineering Technical Support, City Hall, 801 Plum Street, Cincinnati, Ohio 45202.

Very truly yours,

GR:TEY:LCR

George Rowe
 Director of Public Works

cc: G. Rowe, Pub
 R. Richardson, A&FM
 A. Ganulin, Law
 L. Reifel, ETS
 TEY/Eng. Files. #3848

EXHIBIT 10

City of Cincinnati

[SEAL]

Department of Public Works Room 450, City Hall
 801 Plum Street
 Cincinnati, Ohio 45202
 George Rowe, P.E.
 Director of Public Works

March 26, 1990

Christian Singles International
 Box 543
 Harrison, Ohio 45030

Re: 'USA Singles News' Publication Newsracks in
 Right-of-Way

Gentlemen:

During the City of Cincinnati Council meeting held on February 7, 1990, a motion was passed, in relation to newsracks, directing the Department of Public Works to enforce Cincinnati Municipal Code 714-23. 'Posting Notices Prohibited', which prohibits the distribution of commercial handbills in any public place. Section 714-1-C defines commercial handbills to mean any printed matter that advertises merchandise or other things for sale or promotes an activity by sales.

The previous newspapers rack regulations do not supersede any previous Codes and therefore material distributed in the right-of-way must conform to established guidelines, i.e. daily or weekly publications primarily presenting coverage of, and commentary on, current events.

According to these guidelines, your publication has been determined to be an advertising publication or commercial handbill and cannot be legally distributed from racks in the right-of-way. Therefore, your permit to allow placement of dispensing devices in the right-of-way is revoked and you are hereby notified to remove all dispensing machines from the City owned right-of-way within 30 days of this notice.

If you wish to schedule an administrative hearing, please submit your request in writing to Ms. Letty C. Reifel, Engineering Technical Support, City Hall, 801 Plum Street, Cincinnati, Ohio 45202.

Very truly yours,

GR:TEY:LCR

George Rowe
 Director of Public Works

cc: G. Rowe, Pub Wks.
 L. Reifel, ETS
 Billboard, Files
 Adm. Files
 TEY/Engr. Files

EXHIBIT 11

City of Cincinnati

[SEAL]

Department of Public Works Room 450, City Hall
 801 Plum Street
 Cincinnati, Ohio 45202
 George Rowe, P.E.
 Director of Public Works

April 3, 1990

Homes and Land of Greater Cincinnati
 Mr. Monte Solovy
 Associate Publisher
 8572 Eagle Walk Lane
 Cincinnati, Ohio 45255

Re: 'Homes and Land of Greater Cinti.' Publication
 Newsracks in Right-of-Way

Dear Mr. Solovy:

At the City of Cincinnati Council meeting held on February 7, 1990, a motion was passed, in relation to newsracks, directing the Department of Public Works to enforce Cincinnati Municipal Code 714-23. 'Posting Notices Prohibited', which prohibits the distribution of commercial handbills in any public place. Section 714-1-C defines commercial handbills as any printed matter that advertises merchandise or other things for sale or promotes an activity by sales.

The previous newspaper rack regulations do not supersede any previous Codes and therefore material distributed in the right-of-way must conform to established guidelines, i.e. daily or weekly publications primarily

presenting coverage of, and commentary on current events.

According to these guidelines, your publication has been determined to be an advertising publication or commercial handbill and cannot be legally distributed from racks in the right-of-way. Furthermore, your failure to comply with current newsrack regulations constitutes an illegal usage of the right-of-way and you are hereby notified to remove all dispensing machines from the city owned right-of-way within 30 days of this notice. If you fail to comply with this order your devices will be immediately and permanently confiscated without further notice.

If you require additional information, please contact Letty Reifel at 352-4501.

Very truly yours,

GR:TEY:LCR

George Rowe
 Director of Public Works

cc. G. Rowe, Pub. Wks.
 R. Ganulin, Law
 L. Reifel, ETS
 Billboard. Files
 Adm. Files
 TEY/Engr.Files

EXHIBIT 12

City of Cincinnati

[SEAL]

Department of Public Works

Room 450, City Hall
801 Plum Street
Cincinnati, Ohio 45202
George Rowe, P.E.
Director of Public Works

April 6, 1990

Margaret M. Moertle
Discovery Center
1700 Madison Road
Cincinnati, Ohio 45206

Dear Ms. Moertle:

On April 5, 1990 the City of Cincinnati heard your appeal concerning the revocation of Discovery Network's permit to distribute its publication in the right-of-way. Pursuant to Section 714-23 of the Cincinnati Municipal Code Discovery Center has been found to be a commercial handbill. You hereby are notified that you have thirty days from the date of this letter to receive the Discovery Center racks from the public right-of-way.

Very truly yours,

George Rowe
Director of Public Works

GR:TEY:LCR

cc. G. Rowe, Pub. Wks.
R. Ganulin, Law
R. Cordes, Eng.
L. Reifel, ETS.
Newsrack. Files
Adm. Files
TEY/Engr. Files 3848

April 13, 1990 extended for one (1) week per R. Ganulin

EXHIBIT 13

City of Cincinnati

[SEAL]

Department of Public Works

Room 450, City Hall
801 Plum Street
Cincinnati, Ohio 45202

George Rowe, P.E.
Director of Public Works

May 1, 1990

Louis J. Maggiotto Jr.
Harmon Publishing
667 Madison Avenue
New York, New York 10021

Dear Mr. Maggiotto:

On April 26, 1990 the City of Cincinnati heard your appeal concerning the revocation of Harmon Publishing's permit to distribute its publication in the right-of-way. Pursuant to Section 714-23 of the Cincinnati Municipal Code 'Homes Magazine' has been found to be a commercial handbill. You hereby are notified that you have thirty days from the date of this letter to remove the Harmon Publishing racks from the public right-of-way.

Very truly yours,

/s/ George Rowe
George Rowe
Director of Public Works

EXHIBIT 14

Revised DRAFT

6-14-90

ADMINISTRATIVE REGULATION NO. ____

PURPOSE

In accordance with Section 911-7 of the Cincinnati Municipal Code, the following rules and regulations for newsracks in the public right-of-way are promulgated to protect the public safety and welfare and reasonable use of the streets by vehicular and pedestrian traffic.

1. No person shall install or maintain any newsrack within the public right-of-way without first applying for a permit for the newsrack with the Director of Public Works. The application shall be in the form attached as Exhibit A and shall be renewed annually by July 1. The Director shall approve or disapprove the application within five business days. Newsracks which have been approved by July 1, 1990 and which are otherwise in compliance with this regulation shall be grandfathered for purposes of this permit application. A person whose application for a permit has been denied may request review by the City's Sidewalk Board of Appeals.

2. Newsracks *shall not* be located where they would obstruct the reasonable use of the following:

- a. Bus stops
- b. Front doors of major buildings; offices, hotels, department stores
- c. Parking spaces, parking meter posts
- d. Cross walks

- e. Fire Hydrants and boxes
 - f. Pull boxes for city light poles
 - g. Utility boxes such as water, sewer, gas, telephone
 - h. Handicapped ramps
 - i. Sign stanchions
 - j. Truck loading zones, taxi-cab stands
 - k. Other Locations presenting danger to the safety and welfare of persons using the right-of-way or creating a public nuisance.
3. Newsracks shall, where possible, be placed in the "collector strip" on sidewalks where paving patterns exist. The newsracks shall be aligned in a row of not more than six (6) in one location. The row shall be placed behind the first city light or traffic pole a distance of at least 5'0". The boxes shall be spaced a minimum distance of 1'6" (18") from the outside face of the curb and shall align with paving joints in all locations.
4. For *skywalk* locations, newsracks shall be located only in areas of greater width than the standard 15' 0" right-of-way, such as building lobbies, plazas, arcades, etc. All newsracks shall be aligned in single rows along building walls.
5. a. In the Central Business District and neighborhood business districts with approved urban Design Plans, newsracks shall, where feasible, be bolted to the sidewalk using stainless steel sleeves and bolts and/or threaded rods.
- b. In other areas the newsracks may be attached to utility, light, or traffic control poles provided that

all cables or chains are covered with plastic sleeves or protective coating to the satisfaction of the City.

6. All newsracks in the public right-of-way shall be the K-80, the K-500, the Gansat or equivalent design.
7. All newsracks at a location shall be aligned in a row and be spaced approximately four inches apart. All taller boxes, such as the K-500s and the Gansat shall be grouped together and be on one end of the row. The other boxes (K-80) shall also be adjacent to each other.
8. Each permittee shall assume all responsibility for damage caused by acts or omissions by permittee for the repair of the sidewalk to the City's satisfaction. Each permittee shall be responsible for reasonably restoring the sidewalk to its previous condition if for any reason a newspaper box is removed. Each permittee shall obtain a performance bond to the satisfaction of the City in the amount of \$10,000 per calendar year to insure repair of any damages to the sidewalk or other facilities.
9. Each permittee shall indemnify and hold harmless the adjacent property owner and the City of Cincinnati from damage resulting solely from the installation or operation of its newspaper boxes. In addition, each permittee shall file with the Director of Public Works proof of current comprehensive liability insurance for its newsracks.
10. All persons, partnerships or corporations operating newsracks must provide the Director of Public Works with a location inventory of such devices located within the public right-of-way. The location inventory must be updated yearly by July 1st. The inventory shall consist of a listing of locations.

11. Each newsrack shall be maintained in a neat and clean condition and in good repair at all times so that:

- a. It is reasonably free of dirt and grease.
- b. It is reasonably free of chipped, faded, peeling and cracked paint in the visible painted areas thereof.
- c. It is reasonably free of rust and corrosion in the visible unpainted metal areas thereon.
- d. The clear plastic or glass parts thereof, if any, through which the publications therein are viewed are unbroken and reasonably free of cracks, dents, blemishes and discoloration.
- e. The paper or cardboard parts or inserts thereof are reasonably free of tears, peeling or fading.
- f. The structural parts thereof are not broken or unduly misshapen.
- g. No advertising media shall appear on the newsrack except the name and price of the publication, promotion of the publication, and publisher.

12. If upon written notification or such other method of notification consistent with an emergency the permittee of a newsrack fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code within five business days, the newsrack shall be removed from the right-of-way and the permittee shall be billed for the cost of removal and storage of the device. In all non-emergency situations, the permittee shall have five business days to request an opportunity to object to the order to remedy violations.

The objection of the permittee shall be heard by the Sidewalk Board of Appeals within five business days of the request.

13. Newsracks that are installed after the original locations are established shall be placed in the center of a row. The company installing a new rack shall be responsible for realigning the other newsracks at its expense.

14. It is City policy to permit only the K-80 newsrack or an equivalent design within new development blocks, public arcades, skywalks, and other locations not in the street right-of-way.

15. This regulation shall be effective upon date of approval by the City Manager except as follows:

- a. Sections 3, 4, 5, 6, 7, 13, and 14 shall be effective as of September 1, 1990 for the Central Business District. The Central Business District is defined to be the area bounded by the Ohio River, I-75, Reading Road and the mid-block alley north of Central Parkway, and Gilbert Avenue and Eggleston Avenue.
- b. Sections 3, 5, 6, 7, 13, and 14 shall be effective as of December 31, 1992 for neighborhood business districts with approved Urban Design Plans.
- c. Sections 3, 4, 5a, 6, 7, 13, and 14 do not apply to areas outside the Central Business District and neighborhood business districts with approved Urban Design Plans.

- d. Compliance with Section 5b shall be completed for the entire City by December 31, 1991.
-

EXHIBIT 15

The Cincinnati Enquirer

The Cincinnati Post

The Kentucky Post

**617 VINE STREET
CINCINNATI, OHIO 45201
(513) 369-1874**

WILLIAM R. JOHNSTON
VICE PRESIDENT - CIRCULATION

(Filed June 14, 1990)

June 14, 1990

Mr. George Rowe
Director
The City of Cincinnati
Public Works Department
Cincinnati City Hall
801 Plum Street, Room 450
Cincinnati, OH 45202

RE: *The Cincinnati Enquirer and
The Cincinnati Post and
The Kentucky Post*

Dear Mr. Rowe:

In accordance with Section 911-17 of The Cincinnati Municipal Code and Amended Regulation No. 38, enclosed please find a location inventory of our newspaper vending machines located within the public right-of-way.

The enclosed item is being submitted under protest, and *The Cincinnati Enquirer* and *The Cincinnati Post*, and our

affiliates, hereby reserve our right to challenge the applicable ordinances and regulations and reserve our right to exercise our constitutional or other legal rights and privileges to publish and distribute newspaper publications or related items to the public.

Sincerely yours,

/s/ William R. Johnston
William R. Johnston

WRJ:jf

Enc.

Copy: Office of the City Manager

LIBERTY MUTUAL

This is to Certify that

Gannett Company Inc.
The Cincinnati Enquirer, Inc.
617 Vine Street
Cincinnati, OH 45202

Name and
address of
Insured.

is at the issue date of this certificate, insured by the Company under the policy(ies) listed below. *The insurance afforded by the listed policy(ies) is subject to all their terms, exclusions and conditions and is not altered by any requirement, term or condition of any contract or other document with respect to which this certificate may be issued.

TYPE OF POLICY	CERT.EXP. DATE	POLICY NUMBER
-------------------	-------------------	------------------

* * *

<input checked="" type="checkbox"/> COMPREHENSIVE FORM	Continuous until	LG1-681- 004048-61
<input type="checkbox"/> SCHEDULE FORM	terminated or reduced	
<input type="checkbox"/> PRODUCTS COMPLETED OPERATIONS		

<input type="checkbox"/> INDEPENDENT CONTRACTORS CONTRACTORS PROTECTIVE		
<input checked="" type="checkbox"/> CONTRACTUAL LIABILITY		

LIMITS OF LIABILITY

* * *

BODILY INJURY	PROPERTY DAMAGE
\$ EACH OCCURRENCE	\$ EACH OCCURRENCE
\$ AGGREGATE	\$ AGGREGATE

COMBINED SINGLE LIMIT
BODILY INJURY AND PROPERTY DAMAGE
\$1,000,000 EACH OCCURRENCE
\$1,000,000 AGGREGATE

* * *

ATIONS) OF OPERATIONS & JOB # (if Applicable)

DESCRIPTION OF OPERATIONS Newsracks

will NOT be notified annually of the continuation of this coverage. You will be notified if this coverage is terminated or reduced.

Additional Insured: The City of Cincinnati
Cincinnati City Hall

Illegible OF CANCELLATION: THE COMPANY WILL NOT TERMINATE OR Illegible THE INSURANCE AFFORDED UNDER THE ABOVE POLICIES UNLESS ??? DAYS NOTICE OF SUCH TERMINATION OR REDUCTION HAS BEEN Illegible:

The City of Cincinnati
Cincinnati City Hall

/s/ Linda L. Miller

AUTHORIZED REPRESENTATIVE

2/7/86 clg

DATE ISSUED

Pgb. Pa.

THE CINCINNATI POST
THE KENTUCKY POST
RACK LOCATIONS WITHIN CITY OF CINCINNATI
File: POSTRACK Page: 1

Printed on 6/12/90

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
4005	LIBERTY & WALNUT	SHELL
	LIBERTY & MAIN, NWC	MEATS
	HIGHLAND & DORCHESTER, NEC	BUS STOP
	HIGHLAND & EARNSHAW, NEC	
	HIGHLAND & MCGREGOR	
	HIGHLAND & McMILLAN, NEC	DRY CLEANERS
	HIGHLAND & TAFT (REAR)	TAFT PHARMACY
	READING & MCGREGOR	NATIONWISE AUTO
	JUNE & READING, SEC	WHITE CASTLE
	400 OAK ST.	OUTSIDE VERNON MANOR
	BETHESDA HOSP. WEST ENT.	619 OAK ST.

258

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	BETHESDA HOSP. EAST ENT.	619 OAK ST.
	BEECHER & GILBERT	SHELL
	LINCOLN & READING	KY FRIED CHICKEN
	LINCOLN & READING, NWC	BUS STOP
	410 MELISH	McDONALDS
	MELISH & READING	CHEVRON
	MELISH & READING, NEC	SOHIO
	3377 READING	AVONDALE GROCERY
	GLENNWOOD & READING, SEC	
	READING & BURTON, NEC	
	READING & CHALFONTE, SEC	
	330 FOREST	HI-RISE
	BURNET & ERKENBRECKER	POST OFFICE

259

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	BURNET & ELLAND	BUS STOP
	HIGHLAND & GOODMAN	
4005	GOODMAN & BELLEVUE, NWC	
	SHRINER'S BURN CENTER	202 GOODMAN ST.
	3150 EDEN	PARKING GARAGE
	HOLMES HOSPITAL - FRONT	EDEN & BETHESDA
	MEDICAL COLLEGE LIBRARY	231 BETHESDA
	CHILDRENS HOSP-CROSSWALK	3350 ELLAND
	ELLAND & BETHESDA, SWC	BUS STOP
	BURNET & GOODMAN	BUS STOP
	CINTI HEALTH DEPT.	MELISH & BURNET-REAR
	3131 HARVEY	
	3100 HARVEY	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
720	1701 QUEEN CITY AVE.	SITE & SOUND
	1785 QUEEN CITY AVE.	GENE & EM'S CAFE
	1928 QUEEN CITY AVE.	BURK'S BAR
	2703 ERLINE	ASPEN VILLAGE APTS.
	2701 QUEEN CITY AVE.	EAST TOWER
	2508 FERGUSON	FOUR TOWERS
	3111 GLENMORE	HUMBERT MEATS
<hr/>		
7		
4078	AUBURN & HUNTINGTON, NWC	
	2112 AUBURN	
	27 CALHOUN	MCDONALD'S
	223 CALHOUN	WENDY'S
	263 CALHOUN	ARBY'S
	303 CALHOUN	RAX
	CLIFTON & STRAIGHT, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	FAIRVIEW & McMILLAN, SWC	
	VICTOR & McMILLAN, NEC	
	CLIFTON & McMILLAN, SEC	PRINT SHOP
	CLIFTON & McMILLAN, SWC	CLIFTON HTS. S & L
	CLIFTON & McMILLAN, NEC	OPTICAL
	151 W. McMILLAN	LENHART'S REST.
	150 W. McMILLAN	TACO BELL
	OHIO & McMILLAN, SWC	
	CORRY & VINE, NWC	RESTAURANT
	2600 VINE	PERKIN'S REST.
	2618 VINE	BUS STOP
	2634 VINE	B.W. 3 REST/C.O.
	VINE & CHARLTON, SWC	ZINO'S
	2717 VINE	LaROSA'S
	2712 VINE	MINI-MALL
	2735 VINE	DANIEL'S REST.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	UNIVERSITY & VINE	CHECKS CASHED
	2910 VINE	FRISCH'S
	2915 VINE	POST OFFICE
4078	1001 VINE	LAUNDROMAT
	3333 VINE	MEDICAL BLDG.
	3247 JEFFERSON	FRIES CAFE
	3300 JEFFERSON	BUS STOP
	3362 JEFFERSON	
	290 LUDLOW	SKYLINE CHILI
	319 LUDLOW	IGA
	TELFORD & LUDLOW, NEC	
	349 LUDLOW	LIBRARY
	358 LUDLOW	GOLD STAR CHILI
	MIDDLETON & LUDLOW, NEC	
	371 LUDLOW	SUPER X
	425 LUDLOW	STAR BANK
	3321 CLIFTON	STEAK & EGG REST.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
4100	2101 N. BEND	SUPERAMERICA
	1208 W. GALBRAITH	FRIENDLY'S REST.
	DALY & GALBRAITH, SEC	DRUG
	N. BEND & WINTON	WHITE CASTLE
<hr/>		
	4	
4105	1250 W. 8TH ST.	LaROSA'S
	8TH & DEPOT, NEC	BUS STOP
	8TH & STATE, NEC	BUS STOP
	2500 RIVER RD.	RENE'S MKT.
	DELHI & RIVER RD., NWC	
	DELHI & FAIRBANKS, NWC	
	ELBERON & BASSETT, SWC	THOMAS' PIZZA
	8TH & ELBERON, NEC	
	3600 W. 8TH ST.	QUICK STOP
	8TH & ENRIGHT, NEC	BUS STOP

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	8TH 7 SETON, NEC	BUS STOP
	8TH & HARRIS, NWC	BUS STOP
	3951 W. 8TH ST.	PINECREST APTS.
	8TH & ROSEMONT, NWC	
	8TH & SUNSET, NEC	BUS STOP
	4209 W. 8TH ST.	IGA
	HERMOSA & W. 8TH ST., NEC	
	4387 ST. LAWRENCE	
	846 RAPID RUN	(AT GREENWICH)
	W. 8TH & OVERLOOK, NWC	
	FOLEY & PEDRETTI, NEC	BUS STOP
	4000 DELHI	CLARK STATION
	1101 GRACELY	BUS STOP
	3900 RIVER RD.	BUS STOP
	RIVER RD. & LILIENTHAL, NW	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	RIVER RD. & HILLSIDE, NWC	
	<hr/> 26	
??70	2244 BEECHMONT	GOLD STAR CHILI
	2205 BEECHMONT	HARDEES
	BEECHMONT & CORBLY, SWC	AMERITRUST
	CORBLY & SALVADORE	
	6334 CORBLY	BUS STOP
	2111 BEECHMONT	LaROSA'S
	2069 BEECHMONT	MT. WASH. BAKERY
	1902 SUTTON	LUCAS MKT.
	1701 SUTTON	
	1515 SUTTON	
	<hr/> 10	
4200	WAREHAM & VAN METER	
	BAUM & MONESTARY	
	1007 CELESTIAL	ROOKWOOD
	1115 ST. GREGORY	W L W
	ST. GREGORY & PAVILLION	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	HATCH & WAREHAM	
	824 E. 2ND ST.	GEORGE'S TAVERN
	2228 EASTERN	PONY KEG
	2550 EASTERN	SONOCO
	DELTA & COLUMBIA PKWY	OPP. PRECINCT REST
	DELTA & EASTERN, SEC	BUS STOP
	EASTERN & STANLEY, NEC	DAIRY WHIP
	COLUMBIA PKWY & STANLEY	NORTHWEST CORNER
	EASTERN & DONHAM, NEC	CHURCH
	3923 EASTERN	POST OFFICE
	4575 EASTERN	MULTI-COLOR
	4595 EASTERN	MULTI-COLOR
	LINWOOD & EASTERN, SWC	BUS STOP
	EASTERN & HEEKEN, NEC	
	LUNKEN AIRPORT	MAIN TERMINAL ENT.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	LUNKEN AIRPORT - INSIDE	SKYWAY GALLEY REST.
	4343 AIRPORT RD.	
	WILMER & KELLOGG, SEC	
	3742 KELLOGG	FERGUSON MALL
	5352 KELLOGG	LEBO'S BAR
4220	LUDLOW & SPRING GROVE	WHITE CASTLE
	4008 SPRING GROVE	WHITE CASTLE
	MAD ANTHONY & SPRING GROVE	BUS STOP
	1433 CHASE	MAGIN'S GROCERY
	LANGLAND & CHASE, SWC	CAFE
	1551 PULLAN	SOUTHEAST CORNER
	APJONES & CHAMBERS	SOUTHWEST CORNER
	4138 CHAMBERS	NORTHSIDE GROCERY

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4747 SPRING GROVE	WATER WORKS-PKG LOT
	4452 WINTON	BUS STOP
	4526 CHICKERING ST.	SUN CHEM. GATE 5
	4879 SPRING GROVE	CECOS INT'L
	4861 SPRING GROVE	SWALLENS
	4535 VINE	MEINER'S CAFE
	110 WOOLPER	CHURCH'S CHICKEN
	GLENWOOD & VINE, SEC	BUS STOP
	CLINTON SPRINGS & VINE, SE	BUS STOP
	MITCHELL & VINE, SEC	BUS STOP
	ASMANN & READING, SEC	BUS STOP
	1231 TENNESSEE	BLUE GIBBON REST.
	1244 CALIFORNIA	CALIF. PARKVIEW
	OBERLIN & CALIFORNIA, NWC	MOTHER'S CLEANERS

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	PADDOCK & CALIFORNIA, NEC	BUS STOP
	PADDOCK & REGENT, SEC	CLARK GAS
	211 TOWNSHIP	X-TEK CORP.
	5655 VINE	STAR BANK
4220	LOCUST & VINE, NWC	VINCE'S GROCERY
	LINDEN & VINE, SEC	TAVERN
	6014 VINE	CHILI KITCHEN
	6110 VINE	DINER ON VINE
	OAK & VINE, NEC	RESTAURANT
	66TH & VINE, NEC	BUS STOP
	68TH & VINE, NWC	LAUNDRY
	7001 VINE	5/3rd BANK
	6920 VINE	WALLS KORNER CAFE

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
4240	2151 GILBERT	WELLS FARGO
	658 E. McMILLAN	ZINO'S
	GILBERT & McMILLAN, SEC	CHECKS CASHED
	2338 GILBERT	CLARK STATION
	GILBERT & McMILLAN, NEC	CONCORDE
	GILBERT & McMILLAN, SWC	WILL'S PAWN SHOP
	GILBERT & McMILLAN, NWC	PROVIDENT BANK
	2537 GILBERT	BUS STOP
	934 E. McMILLAN	SUPER X
	935 E. McMILLAN	WOOLWORTH
	KEMPER LA. & McMILLAN, SWC	
	2344 KEMPER LA.	POST OFFICE
	1026 E. McMILLAN	FRISCH'S
	2250 PARK AVE.	APTS.
	1115 E. McMILLAN	SUBWAY
	1130 E. McMILLAN	MCDONALD'S
	2220 VICTORY PKWY.	APTS

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	2525 VICTORY PKWY.	ALMS APTS.
	1200 E. McMILLAN	SKYLINE
	1288 E. McMILLAN	YMCA
	McMILLAN & BELL, SEC	BUS STOP
	1405 E. McMILLAN	CONDO'S
	1351 WM. HOWARD TAFT	BLUE CROSS
	VICTORY PKWY & WM. H. TAFT	NEC - BUS STOP
	1025 WM. HOWARD TAFT	ROY ROGERS
	2533 KEMPER LA.	LIBRARY
4240	MADISON & HACKBERRY, SWC	
	3200 WOODBURN	IKE'S BBQ
	HEWITT & WOODBURN, SEC	
	CLARION & MONTGOMERY	
	2201 DANA	
	DANA & MONTGOMERY, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	3611 WOODBURN	GA GRAY CO.
	LEDGEWOOD & HERALD	KUHLMAN HALL - XU
<u>34</u>		
4245	7039 VINE ST.	CRETAN CHILI
	72ND & VINE	ANDY'S CAFE
	7148 VINE ST.	COUNTRY KITCHEN
	VINE ST.	FLEA MARKET
	8319 VINE ST.	FAMOUS RECIPE
	8401 VINE ST.	HARDEES
	8379 ANTHONY WAYNE	(AT SHEEHAN)
	8249 ANTHONY WAYNE	
	8171 ANTHONY WAYNE	(AT PARKWAY)
	SECTION & ANTHONY WAYNE	SOUTHEAST CORNER

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
4300	4539 HAMILTON & BRUCE	BUS STOP
	4590 HAMILTON	BUS STOP
	4680 HAMILTON	LILLIAN'S
	5830 HAMILTON	LaROSA'S
	1531 CEDAR	POST OFFICE
	5901 HAMILTON	WINE STORE
	5851 HAMILTON	CENTRAL TRUST
	5917 HAMILTON	LICENSE BUREAU
	5932 HAMILTON	THRIFT S & L
	6033 HAMILTON	WHSE AUTO PARTS
	6118 HAMILTON	SUBWAY
	N. BEND & HAMILTON, SEC	DRUGS
	1606 N. BEND	KROGER
	8140 PIPPIN RD.	HOSTESS STORE
	3235 W. GALBRAITH	POST OFFICE
<u>15</u>		
4340	2010 MADISON	BUS STOP
	2114 MADISON	PACK PHARMACY-PKG.
	2400 MADISON	BUS SHELTER
	3675 MADISON	BUSKIN BAKERY
	3670 MADISON	LaROSA'S

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4070 MADISON	BUS SHELTER
	MADISON & EDWARDS, SEC	
	3510 EDWARDS	ECHO RESTAURANT
	2650 ERIE	AMERITRUST
	2649 ERIE	ACORN
	2701 ERIE	DECKER DRUGS
	2721 ERIE	WEST SHELL
	2724 ERIE	HERMANN'S DRUG
	2734 ERIE @ MICHIGAN	
	2800 ERIE @ SHAW	SR. CITIZEN CTR.
	2905 ERIE	CHURCH
	3431 MONTIETH	MAIROSE BROS. DELI
	2836 OBSERVATORY	CARL'S P.K.
	2901 LINWOOD	BUS STOP
	3172 LINWOOD	BUS STOP
	3175 LINWOOD	SPREEN'S DRUG
	3183 LINWOOD	PROVIDENT BANK
	3197 LINWOOD	THE VIDEO STORE
	617 DELTA	GRANDIN BRIDGE APTS.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	455 DELTA	LINCOLN SCHOOL
	3209 LINWOOD	MT. LOOKOUT PASTA
4340	833 DELTA	SAVINGS & LOAN
	3206 LINWOOD	'THE BRASS BED'
	3100 LINWOOD	BRACKE'S MKT.
	1032 DELTA	EXQUISITE CLEANERS
	DELTA & NILES, NWC	
	DELTA & OBSERVATORY, SEC	
	3350 ERIE	BUS STOP
	MARBURG & PAXTON, SEC	
	HYDE PARK PZA-BUS SHELTER	
	3831 PAXTON	JEKYLL'S PKG LOT
	3711 PAXTON	FAMOUS RECIPE
	3600 PAXTON	NORTHEAST CORNER
	3671 PAXTON	BEAUTY SALON
	2938 WASSON	SPRINGDALE CLEANERS
	2892 WASSON	CORNER - DRAKE
	EDWARDS & WILLIAMS	GOLD STAR CHILI

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	3200 ROBERTSON	VERNE CAFE
	3156 MADISON	LOESH HARDWARE
	3098 MADISON	HARDEES
	ALLSTON & MADISON	BUS STOP
	2974 MADISON	ARBY'S
	3055 MADISON	LAUNDROMAT
	3047 MADISON	5/3RD BANK
	3083 MADISON	SKYLINE CHILI
	MADISON & GILMORE	PUBLIC LIBRARY
	3139 MADISON	UDF
4340	3801 BROTHERTON	GORDON'S DELI
	ERIE & SAYBROOK, NEC	
	3615 ERIE	BARBER SHOP
	3500 ERIE	TISCHBEIN PHARMACY
	3501 ERIE	SUNSHINE FOODS
	3398 ERIE	DUTCH'S PONY KEG

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
4420	5000 RIDGE	APTS
	3639 RIDGE	PONDEROSA
	3172 MADISON	CAPTAIN VIDEO
	3355 MADISON	NICK'S
	MADISON & CHARLEMAR	
	4002 PLAINVILLE	CHILI CO.
	4109 PLAINVILLE	NETWORK VIDEO
	WINDWARD & PLAINVILLE, SEC	
	BUCKINGHAM & PLAINVILLE	
	6750 BRAMBLE	BUS STOP
	BRAMBLE & CONANT	
	4370 ERIE	APARTMENT
	4529 WHETSEL	
	WHETSEL & MADISON, SWC	
	6406 MADISON	BEER DRIVE-THRU
	KENWOOD & MADISON, NEC	BUS STOP
	5908 MADISON	POST OFFICE

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	5227 WHETSEL	COX CLEANERS
	5734 MADISON	SOHIO
<u>19</u>		
4500	HOPPLE & GARRARD, SEC	HARDEES
	2965 COLERAIN	US CHILI
	3001 COLERAIN	CAMP WASH. CHILI
	3201 COLERAIN	FRANZ BROS CAFE/REST
	3233 COLERAIN	POWELL VALVE CO.
	MONMOUTH & COLERAIN, NWC	
	1329 ARLINGTON	CROSLEY BLDG.
	3401 SPRINGGROVE	NOAH'S ARK
	3112 SPRINGGROVE	STOCKYARD CAFE
	BEEKMAN & DREMAN	MR. GENE'S DOG HOUSE
	3408 BEEKMAN	ARMOR METAL CO.
	3724 DIRR ST.	
	3827 SPRINGGROVE	LIBERTY TIRE
	4020 HAMILTON	BUS STOP

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4120 HAMILTON	POST OFFICE
	4140 HAMILTON	PROVIDENT BANK
	LINGO & HAMILTON, NEC PULLAN & HAMILTON, NWC	PARKING LOT
	PULLAN & PITTS, NEC	
	CHASE & PITTS, NEC	CHURCH
	CHASE & LAKEMAN, SWC	
	CHASE & HAMILTON, NWC	
	4147 HAMILTON	KY FRIED CHICKEN
	1636 KNOWLTON	IGA
	BLUE ROCK & CHERRY, SWC	
	CHASE & VIRGINIA, NEC	BUS STOP
4500	5550 COLERAIN	1 HR. CLEANERS
	5560 COLERAIN	MY UNCLE'S PLACE
	5553 COLERAIN	GOLD STAR CHILI

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	N. BEND & E. KNOLL, SEC	APTS.
	N. BEND & CLOVERLEAF, SWC 5642 CHEVIOT	CLARK STATION DRY CLEANERS
	2810 BLUE ROCK	GOLD TOP DAIRY
	6999 COLERAIN	STOLLE'S DELI
	7410 COLERAIN	CLARK GAS
	5799 COLERAIN	BESSE PHARMACY
<u>36</u>		
4562	WOODFORD & RIDGE, NWC	
	WOODFORD & MONTGOMERY, NWC	BUS STOP
	RIDGE & MONTGOMERY, SEC	BUS STOP
	6104 MONTGOMERY	RESTAURANT
	6124 MONTGOMERY	IGA
	6150 MONTGOMERY	WALGREENS
	6225 MONTGOMERY	LaROSA'S
	MONTGOMERY & ORCHARD, NWC	
	BANTRY & MONTGOMERY, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	COLERIDGE & MONTGOMERY	SOUTHEAST CORNER
	6805 MONTGOMERY	
<u>11</u>		
4565	900 STATE ST.	POST OFFICE
	1212 STATE ST.	KROGER
	2500 WARSAW	APTS.
	WARSAW & DEL MONTE PL., NE 3512 WARSAW	BUS STOP EMPIRE CHILI
	3614 WARSAW	S & H PRINTING
	WARSAW & ENRIGHT, NEC	RESTAURANT
	3715 ST. LAWRENCE	BAKERY
	975 ENRIGHT	POST OFFICE
	960 ENRIGHT	KY KROGER
	3736 WARSAW	HARDEES
	3822 GLENWAY	SKYLINE
	3912 GLENWAY	TACO BELL
	3916 GLENWAY	WALGREENS
	4010 GLENWAY	LaROSA'S
	4018 GLENWAY	HILLTOP RESTAURANT

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	GILSEY & GLENWAY, NWC	BAR
	DEWEY & GLENWAY, NEC	TAVERN
	4206 GLENWAY	L.J.S.
	4221 GLENWAY	SAVINGS & LOAN
	3801 GLENWAY	KY FRIED CHICKEN
	3783 WARSAW	WENDY BUS STOP
	3546 WARSAW @ McPHERSON	TROTTA'S PIZZA
	3449 WARSAW	LICENSE BUREAU
	3417 WARSAW	UDF
	WARSAW & ELBERON, SWC	WHITE CASTLE
4565	WARSAW & HAWTHORNE, SWC	BUS STOP
	2719 PRICE	RED'S GROCERY
	2900 GLENWAY @ WING	
	3300 GLENWAY	E & J PUB
	3399 GLENWAY	AMOCO
	3721 GLENWAY	HANDY PANTRY
	4420 GLENWAY	UDF
	RAPID RUN & GLENWAY, SWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4850 GLENWAY	KROGER
	4914 GLENWAY	BELLA NAPOLI REST.
	4920 GLENWAY	PRICE HILL CHILI
	GLENWAY & CLEVES-WARSAW	5/3RD BANK
	4901 CLEVES-WARSAW	AUTO PARTS
	4978 CLEVES-WARSAW	BUS STOP
	5341 GLENWAY	McDONALD'S
	5305 GLENWAY	BACALL'S CAFE
	5259 GLENWAY	FAMOUS RECIPE
	2376 FERGUSON	GRAETER'S
	2411 BOUDINOT	LaROSA'S
<hr/> 45		
4590	1518 SUMMIT	SUMMIT EAST APTS.
	1730 SECTION	POST OFFICE
	SECTION & READING, SEC	BUS STOP
	2200 LANGDON FARM	NORTHEAST CORNER
	7375 BROOKCREST	HAT SHOP
	EASTLAWN & LOSANTIVILLE	SOUTHEAST CORNER
	2151 LOSANTIVILLE	UDF

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	2235 LANGDON FARM	HILTON DAVIS CO.
	SEYMOUR & RHODE ISLAND, SW	
	LANGDON FM. & RHODE ISLAND	SOUTHWEST CORNER
	5807 RHODE ISLAND	BUS STOP
	5200 READING	
	4901 READING	KY FRIED CHICKEN
	SEYMOUR & GLENMEADOW, NEC	
<hr/> 14		
4688	2020 DALTON	GOLD STAR CHILI
	SHERMAN & DALTON	POST OFFICE
	939 W. 8TH ST.	VICTORIA STATION
	1223 CENTRAL PKWY.	WCET
	1105 ELM	YMCA
	123 W. LIBERTY	KY FRIED CHICKEN
	12TH & VINE, SEC	BUS STOP
	E. LIBERTY & VINE	ANGELO'S PIZZA
	1718 VINE	STENGER'S CAFE
	1738 RACE	IGA

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	ELDER & RACE, SWC	COHEN SHOES
	ELDER & ELM, SEC	
	1916 ELM	K.D. LAMP
	1880 CENTRAL PKWY.	
	1930 CENTRAL PKWY.	AUFDENKAMPE HDWE.
	CLIFTON & KLOTTER	
	301 EMMING	EMMING GROCERY
	WARNER & RAVINE	MARK'S PARKVIEW
	CENTRAL PKWY & HOPPEL	WHITE CASTLE
	700 RIDDLE RD.	RIDDLE RD. APTS.
<hr/> 20		
4718	KNIGHT & MONTGOMERY, SWC	CLARK GAS
	DOUGLAS TER. & MONTGOMERY	SEC, BUS STOP
	LESTER & MONTGOMERY, NEC	R & S FOODS

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	6032 MONTGOMERY	PLEASANT RIDGE CHILI
	6014 MONTGOMERY	NATIONWISE
<u>5</u>		
4720	1920 LINN	POPEYE CHICKEN
	1733 CENTRAL AVE.	CINTI TIME RECORDER
	HARRISON & COLERAIN, SWC	BRIGHTON CORNER
	HARRISON & SPRINGGROVE	5/3RD BANK- PARKING
	2101 WESTERN AVE.	SORTA
	DRAPER & SPRINGGROVE, NEC	BUS STOP
	2535 SPRINGGROVE	JERGEN CO.
	MARSHALL & COLERAIN, SWC	
	2838 COLERAIN	BADER CAFE
	2927 COLERAIN	PROVIDENT BANK
	2951 COLERAIN	POST OFFICE
	SUTTER & 'W'WOOD- NORTHERN	NORTHEAST CORNER
	1500 QUEEN CITY	TWIN TROLLEY REST.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	1964 HARRISON	UDF
	BAKER & HARRISON, NEC	
	ROBERT & HARRISON, NEC	
	McKINLEY & HARRISON, NWC	
	FISCHER & HARRISON, NEC	
	2957 MONTANA	BAKERY
	3081 HARRISON	HABIG'S RESTAURANT
	3103 HARRISON	WESTWOOD GRILL
	3154 HARRISON	HALL'S DRUG
	BOUDINOT & MONTANA, NEC	
	McHENRY & FYFFE, NWC	LaROSA'S
	3222 McHENRY	McHENRY CARRY OUT
8360	525 VINE	CITIZENS FEDERAL
	6TH & VINE, SWC	DELTA AIRLINES
	6TH & VINE, NWC	CINCINNATIAN HOTEL

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	6TH & VINE, NEC	CINTI COMMERCE CTR
	6TH & VINE, SEC	KY FRIED CHICKEN
	617 VINE ST.	ENQUIRER BLDG
	628 VINE ST	SPORTS PAGE REST.
	7TH & VINE, SEC	PROVIDENT BANK
	643 VINE ST.	SKYLINE CHILI
	720 VINE ST.	BUS STOP
	715 VINE ST.	BISTRO ON VINE
	8TH & VINE, NEC	CINTI PUBLIC LIBRARY
	2 GARFIELD PLACE	GARFIELD HOUSE
	9TH & VINE, SEC	BUS STOP
	9TH & VINE, SWC	BENJAMIN'S REST.
	9TH & VINE, NEC	PARKING
	COURT & WALNUT, SEC	COURT OPTICAL
	25 E. COURT ST.	ACADEMY LOCK
	1001 VINE ST.	SKYLINE CHILI
	1010 VINE ST.	KROGER BLDG
	CENTRAL PKWY & VINE, NEC	PARKING LOT

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	1128 WALNUT ST.	TECH GRILL
	30 E. CENTRAL PKWY	AMERICAN BLDG
	COURT & WALNUT, NWC	COURT GRILL
	COURT & WALNUT, SWC	DISCOUNT DRUG
	9TH & WALNUT, NWC	BUS STOP
8360	898 WALNUT ST.	YWCA
	8TH & WALNUT, NEC	BUSKIN BAKERY
	8TH & WALNUT, NWC	BUS STOP
	8TH & WALNUT, SWC	ST. LOUIS CHURCH
	8TH & BOWEN, SEC	PARKING LOT
	7TH & WALNUT, NEC	FRISCH'S REST.
	7TH & BOWEN, NWC	OLYMPIC GARAGE
	7TH 7 WALNUT, NWC	SUPER X
	34 E. 7TH ST.	SUBWAY
	7TH & WALNUT, SWC	OPTICAL
	620 WALNUT ST.	SANDMANN'S REST.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	629 WALNUT ST.	GOLD STAR CHILI
	6TH & WALNUT, NWC	WATCHWORKS
	6TH & WALNUT, NEC	ARBY'S
	6TH & WALNUT, SEC	580 BLDG.
	6TH & WALNUT, SWC	CARD & GIFT
	30 E. 6TH ST.	MCDONALDS
	26 FOUNTAIN SQ. PLAZA	CHEESE VILLA
	511 WALNUT ST.	DUBOIS TOWER
	510 WALNUT ST.	US POST OFFICE
	101 E. 5TH ST.	TRI-STATE BLDG
	121 E. 5TH ST.	WALGREEN'S
	5TH & WALNUT, SWC	STAR BANK
	425 WALNUT ST.	WESTIN TOWER
	4TH & WALNUT, NEC	BUS STOP
	101 E. 4TH ST.	CLOPAY BLDG

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
8360	4TH & WALNUT, SWC	DIXIE TERMINAL
	4TH & WALNUT, NWC	JOHNSTON & MURPHY
	28 E. 4TH ST.	PHILLY'S REST.
	4TH & MAIN, NWC	FEDERAL RESERVE
	4TH & MAIN, NEC	BUS STOP
	4TH & MAIN, SEC	ATRIUM ONE
	4TH & MAIN, SWC	CG&E
	123 E. 4TH ST.	
	150 E. 4TH ST.	FED RESERVE BUS STOP
	RIVERFRONT STADIUM	PLAZA LEVEL SKYWALK
	NORTHEAST PLAZA	RIVERFRONT STADIUM
	SOUTHEAST PLAZA	RIVERFRONT STADIUM
	SOUTHWEST PLAZA	RIVERFRONT STADIUM
	GATE 13	RIVERFRONT STADIUM

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	NORTHWEST PLAZA	RIVERFRONT STADIUM
	GATE 3	RIVERFRONT STADIUM
	RIVERFRONT STADIUM-NORTH	NORTH SKYWALK
	6TH & VINE, SEC	KY KY FRIED CHICKEN
	617 VINE ST.	KY ENQUIRER BLDG
	1010 VINE ST.	KY KROGER BLDG
	30 E. CENTRAL PKWY.	KY AMERICAN BLDG
	898 WALNUT ST.	KY YWCA
	6TH & WALNUT, SWC	KY CARD & GIFT
	101 E. 5TH ST.	KY TRI-STATE BLDG.
	4TH & WALNUT, SWC	KY DIXIE TERMINAL
	4TH & MAIN, NWC	KY FEDERAL RESERVE
78		
8362	3RD & VINE, NEC	PARKING LOT
	309 VINE	RESTAURANT

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4TH & VINE, NWC	
	4TH & VINE, NEC	
	4TH & VINE, SEC	PROVIDENT TOWER
	4TH & VINE, SWC	CENTRAL TRUST
	25 W. 4TH ST.	McALPIN'S
	33 W. 4TH ST.	FRISCH'S
	4TH & RACE, NWC	PARKING GARAGE
	101 W. 4TH ST.	HUNTINGDON BANK
	323 RACE ST.	CENTRAL TRUST ANNEX
	4TH & ELM, SWC	
	4TH & ELM, NWC	NORTHLICH & STOLLEY
	231 W. 4TH ST.	4TH & PLUM DELI
	219 W. McFARLAND	
	3RD & PLUM, SWC	
	230 W. PETE ROSE WAY	CADDY'S
	49 CENTRAL AVE.	SQUERI CASH & CARRY
	4TH & CENTRAL, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	750 CENTRAL	CENTENNIAL PLAZA
	801 CENTRAL	CITY HALL
	9TH & CENTRAL, NEC	BUSKIN BAKERY
	9TH & CENTRAL, NWC	SOUTHERN OHIO COLL.
	9TH & PLUM, SEC	
	7TH & PLUM, SEC	CINTI BELL
	6TH & PLUM, NWC	PARKING GARAGE
8362	5TH & PLUM, SEC	PARKING LOT
	215 E. 5TH ST.	CONVENTION PLACE
	5TH & ELM, NWC	CLARION HOTEL
	5TH & ELM, NEC	HYATT REGENCY HOTEL
	5TH & ELM, SWC	CONVENTION CENTER
	5TH & RACE, SWC	SAKS FIFTH AVE.
	5TH & RACE, NEC	LERNER SHOP
	5TH & RACE, SEC	NETHERLAND ARCADE
	30 W. 5TH ST.	SKYLINE CHILI
	5TH & VINE, SWC	BUS STOP
	5TH & VINE, NWC	OLD ELDER- BEERMAN

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	5TH & VINE, SEC	WESTIN HOTEL
	425 VINE ST.	CAREW TOWER ARCADE
	51 E. 5TH ST.	WESTIN-5TH ST. ENT.
	6TH & RACE, SWC	WALGREENS
	6TH & RACE, NEC	NEWBERRY'S
	6TH & RACE, NWC	DINO'S
	6TH & RACE, SEC	SAXONY IMPORTS
	617 RACE ST.	BAKER SHOES
	6TH & ELM, NEC	BUS STOP
	6TH & ELM, SWC	CONVENTION CENTER
	GEORGE & ELM, SWC	PARKING GARAGE
	7TH & ELM, SWC	LAZARUS GARAGE
	7TH & ELM, NWC	PARKING LOT
	7TH & ELM, SEC	LAZARUS
	7TH & ELM, NEC	
8362	ELM BET. 7TH & GARFIELD	BUS STOP
	125 W. 7TH ST.	LAZARUS' BUS STOP
	7TH & RACE, SEC	PAYLESS SHOES
	7TH & RACE, SWC	LAZARUS

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	7TH & RACE, NEC	GLOBE RECORDS
	7TH & RACE, NWC	CENTRAL TRUST
	19 GARFIELD PLACE	PRESIDENTIAL PLAZA
	8TH & RACE, NEC	PHOENIX
	8TH & RACE, SEC	MOVIES
	801 ELM ST.	CHILI STOP REST.
	819 ELM ST.	IZZY'S REST.
	901 ELM ST.	LEGAL AID SOCIETY
	9TH & ELM, NEC	BAR
	COURT & ELM, SEC	BUS STOP
	15 W. CENTRAL PKWY.	AAA
	9TH & RACE, NEC	PARKING LOT
	525 RACE ST.	BUS STOP
	124 W. CONVENTION WAY	EGG CETERA- SKYWALK
	508 RACE - ON SKYWALK	ROY ROGERS
	4TH & VINE, SWC	KY CENTRAL TRUST
	101 W. 4TH ST.	KY HUNTINGDON BANK
	4TH & ELM, SEC	KY

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	PLUM & McFARLAND	KY
	115 W. 7TH ST.	KY LAZARUS' BUS STOP
	7TH & RACE, SWC	KY LAZARUS
	6TH & RACE, SWC	KY WALGREEN'S
8362	508 RACE-ON SKYWALK	KY ROY ROGERS
	124 W. CONVENTION WAY	KY EGG CETERA (SKYWALK)
	5TH & RACE, SEC	KY NETHERLAND ARCADE
	425 VINE	KY CAREW TOWER ARCADE
	19 GARFIELD PL.	KY PRESIDENTIAL PLAZA
<hr/> 83		
8363	4TH & BROADWAY, NEC	WESTERN SOUTHERN
	4TH & BROADWAY, NWC	CLEANERS
	5TH & BROADWAY, SEC	WESTERN SOUTHERN

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	5TH & BROADWAY, SWC	PARKING LOT
	120 E. 6TH ST.	P & G CROSSWALK
	6TH & BROADWAY, NWC	P&G PARKING
	517 SYCAMORE	CROSSWALK
	6TH & SYCAMORE, NWC	CLEANERS
	299 E. 6TH ST.	DUTTENHOFFER BLDG.
	607 SYCAMORE	ST. XAVIER CHURCH
	628 SYCAMORE	HUMAN SERVICES
	201 E. 6TH ST.	FEDERAL BLDG
	210 E. 6TH ST.	BUSKIN BAKERY
	6TH & MAIN, NEC	
	6TH & MAIN, NWC	BLUE CHIP SAVINGS
	6TH & MAIN, SWC	CENTRAL TRUST
	6TH & MAIN, SEC	FEDERAL BLDG
	132 E. 6TH ST.	FRISCH'S
	119 E. 6TH ST.	LaROSA'S
	5TH & MAIN, SWC	BUS STOP
	5TH & MAIN, NWC	GOV'T SQ. BUS STOP

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	550 MAIN	FEDERAL BLDG
	5TH & MAIN, NEC	FEDERAL COURT
	5TH & MAIN, SEC	CENTRAL TRUST
	250 E. 5TH ST.	CHIKUITA CENTER
	315 E. 5TH ST.	TAFT THEATRE
8363	400 PIKE	POLK BLDG.
	300 PIKE	AMERICAN BOOK BLDG
	506 E. 4TH ST.	PHELPS APTS.
	4TH & LAWRENCE, NWC	WESTERN SOUTHERN
	4TH & SYCAMORE, NEC	BUS STOP
	4TH & SYCAMORE, SWC	ATRIUM II
	310 SYCAMORE	PARKING GARAGE
	251 E. 4TH ST.	A T & T
	250 E. 4TH ST.	WENDY'S
	620 MAIN	BUS STOP
	7TH & MAIN, SWC	PARKING LOT
	654 MAIN	CIANCILO'S MKT.
	7TH & MAIN, NWC	ART SUPPLY

300

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	716 MAIN	DENNISON HOTEL
	8TH & MAIN, SEC	BUS STOP
	8TH & MAIN, NEC	
	9TH & MAIN, SWC	
	9TH & MAIN, SEC	
	9TH & MAIN, NEC	B & G REST.
	118 E. 9TH ST.	PARKING LOT
	125 E. COURT ST.	POST BLDG
	138 E. COURT ST.	COUNTY ADM. BLDG
	COURT & MAIN, NWC	
	COURT & MAIN, SEC	2ND NAT'L BANK BLDG
	925 MAIN	BAKERY
	CENTRAL PKWY. & MAIN, SEC	BUS STOP
8363	CENTRAL PKWY. & SYCAMORE	SOUTHEAST CORNER
	CENTRAL PKWY. & SYCAMORE	SOUTHWEST CORNER
	222 E. CENTRAL PKWY.	ALMS & DOEPKE BLDG
	SYCAMORE & READING, NWC	

301

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	1000 SYCAMORE	JUSTICE CENTER
	913 SYCAMORE	TED'S PLACE
	9TH & SYCAMORE, NWC	
	330 E. 9TH ST.	JUSTICE CTR. 9TH ST.
	8TH & SYCAMORE, NWC	BUS STOP
	224 E. 9TH ST.	POWER BLDG
	9TH & SYCAMORE, NEC	PARKING GARAGE
	315 E. 7TH ST.	WELFARE DEPT.
	634 BROADWAY	N C R
	800 BROADWAY	BURKE BLDG
	824 BROADWAY	BOARD OF ELECTIONS
	1005 GILBERT	GREYHOUND TERMINAL
	6TH & SENTINEL, SWC	PROCTOR & GAMBLE
	PETE ROSE & EGGLESTON, SW	SAWYER POINT
	PETE ROSE & BUTLER, SEC	

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RTE	ADDRESS	LOCATION
	523 E. PETE ROSE WAY	MIDLAND CO.
	PETE ROSE & MEHRING WAY	COLISEUM STEPS
	PETE ROSE & BROADWAY, NWC	
	PETE ROSE & STADIUM DR.	SOUTHEAST CORNER
	PETE ROSE & MAIN	NORTH SIDE
	PETE ROSE WAY & VINE	NORTH SIDE
	4TH & BROADWAY, NWC	KY WESTERN SOUTHERN
8363	4TH & BROADWAY, NEC	KY CLEANERS
	400 PIKE	KY POLK BLDG.
	300 PIKE	KY AMERICAN BOOK BLDG
	251 E. 4TH ST.	KY A T & T
	5TH & MAIN, NEC	KY FEDERAL COURT
	299 E. 6TH ST.	KY DUTTENHOFER BLDG
	201 E. 6TH ST.	KY FEDERAL BLDG
	6TH & MAIN, NEC	KY BLUE CHIP SAVINGS

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RTE	ADDRESS	LOCATION
	9TH & MAIN, SEC	KY
	6TH & SENTINEL, SWC	KY
	523 E. PETE ROSE	KY MIDLAND CO.

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Total Records Displayed: 726

THE CINCINNATI ENQUIRER
 RACK LOCATIONS WITHIN CITY OF CINCINNATI
 File: ENQRACK Page: 1
 Printed on 6/12/90

RTE	ADDRESS	LOCATION
1701	6341 GRACELY DR.	STOP-N-GO
	GRACELY DR. & IVANHOE, NWC	
	PARKLAND & TWAIN, SEC	
	PARKLAND & MONITOR NEC	
	GRACELY DR. & MONITOR, NWC	
	CHEROKEE & PARKLAND, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	CHEROKEE & GRACELY DR., NW	BUS STOP
	GRACELY & WILKINS SHORT	NORTHWEST CORNER
	GRACELY DR. & WYNN, NWC	
	GRACELY DR. & KIRBY, NEC	BUS STOP
	6433 GLENWAY	McDONALD'S
<u>11</u>		
1702	900 STATE ST.	POST OFFICE
	GEST & STATE, NEC	
	1048 STATE ST.	CAFE
	1218 STATE ST.	KROGER
	1218 STATE-KROGER ENTRANCE	
	801 EVANS	LAWSON'S
	4846 RAPID RUN	(AT CORONADO)
	4813 RAPID RUN	(AT OVERLOOK)
	W. 8TH & OVERLOOK, SEC	
	W. 8TH & PEDRETTI	MOORE'S DRUG

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	578 PEDRETTI	(AT FOLEY)
	4761 RAPID RUN	(AT GREENWICH)
	RAPID RUN & ST. LAWRENCE	
	RAPID RUN & HERMOSA	
	ST. LAWRENCE & LUSITANIA	
	4389 W. 8TH ST.	(AT HERMOSA)
	4220 W. 8TH ST.	(AT CLENORA)
	4205 W. 8TH ST.	IGA
	4164 W. 8TH ST.	(AT TRENTON)
	ST. LAWRENCE & KREIS	
	ST. LAWRENCE & RUTLEDGE	
	SUNSET & ST. JAMESTOWN	
	SUNSET & ST. WILLIAMS	
	4099 W. 8TH ST.	(AT SUNSET)
	4030 W. 8TH ST.	NEC - ROSEMONT
	4033 W. 8TH ST.	SEC - ROSEMONT
	3997 W. 8TH ST.	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	ST. LAWRENCE & SUIRRE, NWC	
	ST. LAWRENCE & ROSEMONT	
	3925 W. 8TH ST.	(AT HARRIS)
	ST. LAWRENCE & ACADEMY	
	W. 8TH & SETON, NEC	
	W. 8TH & ENRIGHT, NWC	
	W. 8TH & McPHERSON, NWC	
	W. 8TH & WELLS, NWC	
	W. 8TH & ELBERON	PAM VILLA APTS.
	ELBERON & PHILLIPS, SWC	
	ELBERON & BASSETT, NWC	
	W. 8TH & MT. HOPE SWC	
	PRICE & HAWTHORNE, SWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
1703	GLENWAY & WING, NEC	
	LEHMAN & GRAND, SEC	
	GLENWAY & GRAND, SWC	BUS STOP
	GLENWAY & CONSIDINE, NWC	BUS STOP
	GLENWAY & PURCELL, NEC	
	3403 GLENWAY	(AT MANSION)
	3411 GLENWAY	(AT WOODLAWN)
	3503 GLENWAY	(AT FAIRBANKS)
	GLENWAY & McPHERSON, NWC	BUS STOP
	GLENWAY & CARSON, SWC	
	GLENWAY & KUHLMAN, SWC	
	GLENWAY & ROSS, SWC	
	3736 WARSAW	HARDEE'S
	3725 WARSAW	BURGER KING
	3703 WARSAW	AMERISTOP

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	WARSAW & ST. LAWRENCE	BAKERY
	975 ENRIGHT	POST OFFICE
	WARSAW & ENRIGHT	WEST SIDE
	3614 WARSAW	RESTAURANT
	WARSAW & McPHERSON, SWC	
	3516 WARSAW	EMPRESS CHILI
	WARSAW & FAIRBANKS, SWC	BUS STOP
	3425 WARSAW	UDF
	WARSAW & ELBERON	WHITE CASTLE
	3406 WARSAW	BONDED GAS
	WARSAW & ELBERON, SEC	
	3317 WARSAW	BUS STOP
	WARSAW & HAWTHORNE, SWC	
	WARSAW & UNDERWOOD	WEST SIDE-BUS STOP
	3782 WARSAW	WENDY'S
	3822 GLENWAY	SKYLINE

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	BEECH & GLENWAY, NWC	
	3916 GLENWAY	WALGREEN'S
	GLENWAY & ILIFF, SEC	
	4165 GLENWAY	RALLY'S HAMBURGERS
	GLENWAY & GILSEY, NEC	
	GLENWAY & DEWEY, NEC	
	GLENWAY & ROSEMONT, SWC	
	GLENWAY & SUNSET, NEC	
	GLENWAY & SUNSET, SWC	
	4420 GLENWAY	UDF
	4507 GLENWAY	AT AMADA-BUS STOP
	GLENWAY & RAPID RUN	BUS STOP
	GLENWAY & OMENA, SWC	BUS STOP
	4850 GLENWAY	KROGER

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	GLENWAY & OVERLOOK, NWC	BUS STOP
	4899 GLENWAY	UDF
	4901 GLENWAY	5/3RD BANK
	4920 GLENWAY	PRICE HILL CHILI
	GLENWAY & RELLEUM, SWC	BUS STOP
	GLENWAY & RALPH, SWC	BUS STOP
	4968 GLENWAY	MEDICAL ARTS BLDG.
	GLENWAY & WESTERN HILLS	SW COR.-BUS STOP
	5053 GLENWAY	BAKERY
	GLENWAY & HEUWERTH, SEC	
	2019 FERGUSON	CENTRAL TRUST
	2370 FREGUSON	GRAETER'S
	2403 BOUDINOT	LaROSA'S
	5450 GLENWAY	CLARK STATION
	5791 GLENWAY	(AT MUDDY CREEK)
	5709 GLENWAY	PROUD ROOSTER
	5341 GLENWAY	McDONALD'S
	5305 GLENWAY	BAKERY

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	5301 GLENWAY	SUBWAY
	5251 GLENWAY	FAMOUS RECIPE
	1401 COVEDALE	BUS STOP
	GLENWAY & HIGHVIEW, SWC	
	4985 CLEVES PK.	(AT NANCY LA.)
	CORONADA & ZULA	
	ILIFF & TALBERT, SEC	
	FIRST & HEYWARD, SEC	
	MANSS & LATHAM, SEC	
	BEECH & LATHAM, SEC	
	3763 WESTMONT	
	3557 WESTMONT	
	WESTMONT & WYOMING, NEC	
	LIBERTY & QUEBEC, SWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
1704	BEEKMAN & WAVERLY, NWC	
	1713 QUEEN CITY AVE.	SITE-N-SOUND
	1795 QUEEN CITY AVE.	MOLLINGER'S
	QUEBEC & JONTE, SWC	
	WESTWOOD NEAR QUEBEC	
	1703 WESTWOOD	CHOW'S
	QUEEN CITY & SPERBER, NWC	
	2580 QUEEN CITY AVE.	PIZZA
	THOMASVILLE & ERLENE	MAIL BOX
	ERLENE	
	QUEEN CITY & EAST TOWER	SE CORNER BUS STOP
	FERGUSON & FOUR TOWERS	NORTHEAST CORNER
	WERK NEAR BOUDINOT	SOUTH SIDE
	GLENMORE & WERK, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	GLENMORE & HANNA, NWC	
	GLENMORE & DAYTONA, NWC	
	GLENMORE & BROADWELL, SEC	
	GLENMORE & MONTANA, NEC	
	DARTMOUTH & MONTANA, SWC	BUS STOP
	CHEVIOT & MONTANA, SEC	BUS STOP
	EPWORTH & MONTANA, SEC	
	2955 MONTANA	BAKERY
	MONTANA & WUNDER, SEC	
	MONTANA & MUSTANG, SEC	
	MONTANA & ANACONDO, SEC	
	2804 WESTERN- NORTHERN BLVD	
	3356 HARRISON	POST OFFICE
	HIGHBREED & HARRISON, SEC	

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<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	HARRISON & BOUDINOT	WHITE CASTLE
	HARRISON & BOUDINOT, SEC	
	HARRISON & TEMPLE, SEC	
	HARRISON & EPWORTH, SWC	
	3103 HARRISON	RESTAURANT
	HARRISON & MONTANA, NEC	
	HARRISON & KLING, NEC	
	HARRISON & EGGERS, SWC	
	HARRISON & FISHER, NEC	
	HARRISON & FISHER, SWC	BUS STOP
	HARRISON & McKINLEY, NWC	
	HARRISON & LAFEUILLE, NWC	BUS STOP
	2608 HARRISON	VOLLRATH

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<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	HARRISON & WOODROW, NWC	BUS STOP
	HARRISON & DEBERCK, NWC	
	HARRISON & BRACKEN WOODS	SW CORNER BUS STOP
	HARRISON & McHENRY, SEC	
	McHENRY & CAVANAUGH, NEC	
	McHENRY & SUNSHINE	APARTMENTS
	2400 HARRISON	CANDELWOOD APTS
	HARRISON & OSKAMP, NWC	
	HARRISON & FENTON, NWC	
	HARRISON & ORLAND, NWC	BUS STOP
	HARRISON & HOMESTEAD, SWC	
	HARRISON & TALBOTT, SEC	BUS STOP
	HARRISON & SARVIS, NWC	BUS STOP

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	HARRISON & KNORR, NWC	
	1964 HARRISON	UDF
	HARRISON & FAIRMOUNT, NWC	
<u>57</u>		
1705	SPRING GROVE & QUEEN CITY	BAR
	SPRING GROVE & ALFRED	JERGEN'S
	2815 SPRING GROVE	CSX
	2951 COLERAIN	POST OFFICE
	COLERAIN & HOPPLE, SWC	U.S. CHILI
	COLERAIN & HOPPLE, NWC	CAMP WASH. CHILI
	HOPPLE & GARRARD	HARDEE'S
	ELAM & GARRARD, NEC	
	COLERAIN & MONMOUTH, NWC	
	COLERAIN & BATES (EAST)	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	3233 COLERAIN	POWELL VALVE
	COLERAIN & ARLINGTON, SWC	
	1329 ARLINGTON	
	3101 SPRING GROVE	NOAH'S ARK
	3241 SPRING GROVE	KAHN'S
	SPRING GROVE & AVON	BAR
	3530 SPRING GROVE	RELIABLE
	SPRING GROVE & HOFFNER	WHITE CASTLE
	HAMILTON & HOFFNER, NWC	
	HAMILTON & MOLINE	POST OFFICE
	HAMILTON & KNOWLTON, NWC	BUS STOP
	4154 HAMILTON	BLUE JAY'S
	HAMILTON & LINGO	GROTE BAKERY
	KNOWLTON & APPLE	IGA
	BLUE ROCK & TURREL	CAFE

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	BLUE ROCK & WHITLER	PONY KEG
	BLUE ROCK & DELANEY	BAKERY
	COLERAIN & FLORIDA, NWC	
	COLERAIN & VIRGINIA NEC	
	CHASE & VIRGINIA, NWC	BUS STOP
	CHASE & KIRBY, NWC	
	CHASE & PITTS, SWC	
	3724 DIRR	
	CHASE & LAKEMAN, SWC	BUS STOP
	CHASE & HAMILTON, NWC	
	CHASE & LANGLAND	JUNKER'S
	CHASE & FERGUS	MAGIN'S
	SPRING GROVE & FERGUS, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	SPRING GROVE & CHAMBERS	NORTHEAST CORNER
	SPRING GROVE & CRAWFORD	BAR
	KNOWLTON & CHAMBERS, NWC	
	CHASE & CHAMBERS, SEC	
	LANGLAND & PULLAN, NWC	
	BROOKSIDE & PULLAN, NWC	
	HAMILTON & PULLAN, NWC	
	HAMILTON & WESTMORELAND	
	HAMILTON & BRUCE, SEC	
	GLENPARKER & HAMILTON	
	HAMILTON & OTTE, NWC	
	HAMILTON & SPRINGLAWN, SEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	HAMILTON & SPRINGLAWN	DRIVE-THRU
	HAMILTON & SAXON	WEST SIDE
	HAMILTON & LLANFAIR, SWC	CLEANERS
	HAMILTON & LLANFAIR, NEC	STOP-N-GO
	5842 HAMILTON	CHUNG-CHING'S
	1531 CEDAR	POST OFFICE
	HAMILTON & CEDAR, NEC	
	5917 HAMILTON	LICENSE BUREAU
	HAMILTON & MARLOWE, NWC	
	HAMILTON & ELKTON, SEC	
	HAMILTON & NORTH BEND	DRUG STORE
	NORTH BEND & HAMILTON	KROGER
	N. BEND & HAMILTON-LOT	KROGER
	NORTH BEND & CARY, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	NORTH BEND & SAVANNAH, NWC	
	OAKWOOD & CONNECTICUT	SCHOOL
	COLERAIN & KIPLING	DRUG STORE
	COLERAIN & JESSUP, NWC	
	5562 COLERAIN	MY UNCLE'S PLACE
	NORTH BEND & COLERAIN	AMERISTOP
	NORTH BEND & E. KNOLL CT.	APARTMENTS
	BAHAMA TERRACE NE	
	COLERAIN & HAWAIIAN TER.	APARTMENTS
	COLERAIN & HIGH FOREST	APARTMENTS
<u>74</u>		
1706	4747 SPRING GROVE	WATER WORKS
	N. BEND & WINTON	WHITE CASTLE
	1208 W. GALBRAITH	FRIENDLY'S
	W. GALBRAITH & DALY	SOUTHEAST CORNER
	HOLLYTREE NR. HEMPSTEAD	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	9161 WINTON	CHILI
	9239 WINTON	REALTOR
	3081 W. GALBRAITH	UDF ENTRANCE
	PIPPIN NR. GALBRAITH	FRUIT MARKET
	COMPTON & COMPTON LAKES	
<u>10</u>		
1707	7418 VINE	COUNTRY KITCHEN
	LANGDON & FARM & GRAFTON	SOUTHWEST CORNER
	LANGDON FARM/ RHODE ISLAND	SOUTHEAST CORNER
	SEYMOUR & RHOSE [sic] ISLAND	SW CORNER-BUS STOP
	READING & KENOVA, NWC	BUS STOP
	SECTION & READING, SEC	
	1730 SECTION RD.	POST OFFICE
	READING & AMBERLAWN, NEC	
	1581 SUMMIT	APARTMENTS
	READING & SUMMIT, SEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	MERRILL-DOW BLDG. #43	2110 AMITY
	S. COOPER & LOCK	DIAMOND INTL.
	COOPER & ANTHONY WAYNE	BUS STOP
	320 ANTHONY WAYNE	CELOTEX
	8319 VINE	FAMOUS RECIPE
	8401 VINE	HARDEE'S
	HEREFORD & VINE, SEC	
	RIDGEWAY & VINE	
	ANTHONY WAYNE & SECTION	BAR
	333 W. SEYMOUR	GENERAL ELECTRIC
	70TH & VINE, NWC	BUS STOP
	70TH & VINE, SEC	BUS STOP
	69TH & VINE, SEC	BUS STOP
	66TH & VINE, SEC	BUS STOP
	OAK & VINE, SEC	BUS STOP
	6110 VINE	RESTAURANT

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	WALNUT & VINE, SEC	BUS STOP
	LINDEN & VINE, SEC	
	LOCUST & VINE, NEC	BUS STOP
	TOWNSHIP & VINE	BANK
<hr/>		
30		
1709	CLIFTON & KLOTTER, NWC	
	OHIO & WARNER, NWC	
	2331 CLIFTON	MURPHY'S BAR
	WARNER & RAVINE, NEC	
	FAIRVIEW & WARNER, NWC	
	FAIRVIEW & McMILLAN, SWC	BUS STOP
	VICTOR & McMILLAN, SWC	BUS STOP
	CLIFTON & McMILLAN, SWC	
	CLIFTON & McMILLAN, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	CLIFTON & McMILLAN, SWC	
	130 W. McMILLAN	BURGER KING
	150 W. McMILLAN	ZANTIGO'S
	OHIO & McMILLAN, SWC	BUS STOP
	VINE & McMILLAN, NWC	BUS STOP
	AUBURN & McMILLAN, SWC	
	AUBURN & GILMAN, NWC	
	2115 AUBURN - CHRIST HOSP.	BUS STOP
	AUBURN & HUNTINGTON, NWC	
	AUBURN & W.H. TAFT, NWC	
	VINE & CORRY, NWC	
	2 E. CORRY ST.	PERKINS
	30 E. CORRY ST.	5/3RD BANK
	SCIOTO & W. CORRY	NORTHEAST CORNER
	27 CALHOUN ST.	McDONALDS

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	223 CALHOUN ST.	WENDY'S
	267 CALHOUN ST.	HARDEE'S
	305 CALHOUN ST.	RAX
1709	CALHOUN & CLIFTON, SEC	
	CLIFTON & STRAIGHT	UC LAW SCHOOL
	2709 CLIFTON	UC BUS STOP
	CLIFTON & COLLEGE COURT	SOUTHEAST CORNER
	MARSHALL & PROBASCO, NEC	
	MARSHALL & RIDDLE	UC PONY KEG
	RIDDLEVIEW & RIDDLE, NE	
	CLIFTON & RIDDLE, SWC	
	3321 CLIFTON	STEAK & EGG
	CLIFTON & LUDLOW	SKYLINE
	330 LUDLOW	GRAETER'S
	358 LUDLOW	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	LUDLOW & MIDDLETON, NWC	BUS STOP
	371 LUDLOW	SUPER X
	425 LUDLOW	STAR BANK
	319 LUDLOW	IGA
	BISHOP & JEFFERSON, SEC	
	JEFFERSON & NIXON, NWC	
	BISHOP & NIXON, SWC	
	JEFFERSON & VINE, NWC	BUS STOP
	3200 VINE	CINTI ZOO
	VINE & FOREST	CHURCH'S CHICKEN
	GLENWOOD & HARVEY, NWC	
	BURNET & ERKENBRECKER	POST OFFICE
	BURNET & ERKENBRECKER, SWC	
	BURNET & ELLAND	CHILDRENS HOSPITAL

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	CHILDRENS HOSP- PARKING	ELLAND AVE.
1709	3315 BURNET	BUS STOP
	3315 BURNET	BUS STOP
	BETHESDA & ELLAND, NWC	
	17 BETHESDA AVE.	PARKING GARAGE
	UNIVERSITY & EUCLID, NEC	LAUNDROMAT
	2910 VINE	FRISCH'S
	3001 VINE	LAUNDROMAT
	2917 VINE	POST OFFICE
	UNIVERSITY & VINE, NWC	BUS STOP
	VINE & DANIEL, SWC	
	2718 VINE	COLONNADE
	VINE & CHARLTON, SWC	
	HIGHLAND & HELEN, NWC	BUS STOP
	HIGHLAND & McMILLAN, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	HIGHLAND & McGREGOR, NWC	BUS STOP
	HIGHLAND & EARNSHAW, SWC	
	HIGHLAND & DORCHESTER, NWC	
	LIBERTY & MAIN, NEC	
	LIBERTY & WALNUT, SEC	
	12TH & WALNUT, SEC	
	15TH & VINE	
	ELDER & VINE, SEC	
	ELDER & VINE, NWC	
	McMICKEN & VINE, SEC	
	ELDER & RACE	IGA
	LIBERTY & RACE, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	14TH & RACE, NWC	
1709	14TH & MAIN, NWC	
<u>82</u>		
1710	2030 DALTON	GOLD STAR CHILI
	2187 DALTON	5/3RD BANK
	1933 CENTRAL AVE.	CINTI TIME
	1916 CENTRAL PKWY.	EMPLOYMENT OFFICE
	1223 CENTRAL PKWY	WCET TV
	250 W. COURT ST.	
	COURT & ELM, NEC	
	1101 ELM	YMCA
	1128 ELM - CORNER 12TH ST.	BUS STOP
	1240 CENTRAL PKWY.	MUSIC HALL - REAR
	1525 ELM	HEALTH DEPT.
	13 W. WLDER	BAKERY
	1916 ELM	K.D. LAMPS
	2702 W. McMICKEN	(AT STRAIGHT ST)
	2720 W. McMICKEN	(AT TAFFELL)
	2801 McMICKEN	(AT MARSHALL)

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	RIDDLE & DECKEBACK, NEC	
	W. McMICKEN & HOPPLE, SWC	BAR
	CENTRAL PKWY. & DIXMYTH	WHITE CASTLE
	202 GOODMAN	SHRINERS BURN CENTER
	GOODMAN & BELLEVUE, NEC	
	HIGHLAN [SIC] & GOODMAN, SWC	
	3101 BURNETT	CINTI HEALTH DEPT.
	310 OAK ST.	APTS.
	400 OAK ST.	VERNON MANOR HOTEL
	OAK & READING, NWC	BUS STOP
	619 OAK - WEST	BETHESDA HOSPITAL
1710	619 OAK - EAST	BETHESDA HOSPITAL
	OAK & WINSLOW, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	WM. H. TAFT & BURNETT, SWC	
	READING & DORCHESTER, NWC	
	READING & WM. H. TAFT	WHITE CASTLE
	HARVEY	JEWISH EMS. EXIT
	HARVEY & HICKMAN, SWC	
	3387 READING	
	READING & GREENWOOD	
	READING & DANA	
	DANA & WINDING WAY	
	CLINTON SPRINGS & READING	
	877 MITCHELL	(AT CLINTON SPRINGS)
	641 MITCHELL	(AT ARDMORE)
	4203 VINE	(AT MITCHELL)
	4100 VINE	SOHIO
	3911 VINE	(AT CLINTON SPRINGS)

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	VINE & GLENWOOD, SEC	
	41 W. MITCHELL	BONDED GAS
	ROSS & BROERMAN	
	CHALET & HEDGER	
	PADDOCK & TENNESSEE	PRECISION TUNE
	1231 TENNESSEE	BLUE GIBBON REST.
	1350 TENNESSEE	GENERAL ELECTRIC
	4098 READING	(AT ASMANN)
	PADDOCK & TENNESSEE, NEC	SOHIO
	4760 PADDOCK	METRO
1710	PADDOCK & CALIFORNIA, NEC	
	CALIFORNIA & OBERLIN, NWC	
	CALIFORNIA & READING	UDF
	4823 READING	MCDONALD'S

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
1711	GROVER HILL & MONTGOMERY	NORTHEAST CORNER
	LAWNDALE & MONTGOMERY, SEC	
	COLONIAL & MONTGOMERY, NEC	
	5848 MONTGOMERY	
	FAIRWAY & MONTGOMERY, NWC	
	KNIGHT & MONTGOMERY, SWC	
	5555 MONTGOMERY	
<hr/>		
	7	
1712	1075 CELESTIAL	SW COR. IDA
	1240 IDA	SE COR. PARADROME
	939 PARADROME	SE COR. ELGIN
	998 PARADROME	NW COR. CAREY
	940 HATCH	NW COR. LOUDEN

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	1120 ST. GREGORY	BAGEL'S
	1720 GILBERT	NATURAL HISTORY MUS.
	1100 ST. GREGORY	NE COR. PAVILLION
	EDEN PARK DR. & GILBERT	NORTHEAST CORNER
	2151 GILBERT	
	2340 GILBERT	CLARK GAS
	2460 GILBERT	SE COR. McMILLAN
	2510 GILBERT	NE COR. McMILLAN
	2525 GILBERT	BUS STOP
	859 WM. H. TAFT	WENDY'S - STREET ENT
	497 E. McMILLAN	SW COR. DOVER
	700 E. McMILLAN	NE COR. MAY ST.
	798 E. McMILLAN	PROVIDENT BANK
	2449 GILBERT	SWC McMILLAN-BUS
	934 E. McMILLAN	
	975 E. McMILLAN	SW COR. KEMPER LA.
	1026 E. McMILLAN	FRISCH'S
	1110 E. McMILLAN	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	1119 E. McMILLAN	SUBWAY
	1130 E. McMILLAN	McDONALD'S
	1100 WM. H. TAFT	NE COR. PARK AVE.
	1025 WM. H. TAFT	ROY ROGERS
1712	WM. H. TAFT & GILBERT, NEC	
	2356 PARK AVE.	SE COR. CROSS ST.
	2344 KEMPER LA.	POST OFFICE
	2201 PARK AVE.	NE COR. VICTORY PKWY
	FRANCIS & VICTORY PKWY.	NORTHEAST CORNER
	2330 VICTORY PKWY.	
	1202 E. McMILLAN	NE COR. SKYLINE
	1228 E. McMILLAN	YMCA
	1322 E. McMILLAN	NE COR. BELL
	1402 E. McMILLAN	NE COR. WOODBURN
	1417 E. McMILLAN	SE COR. GRANDVIEW
	2339 GRANDVIEW	SW COR. FLEMING
	2245 PARK AVE.	NW COR. WINDSOR
	2531 WOODBURN	SW COR. LOCUST

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	WOODBURN & WM. H. TAFT	NORTHEAST CORNER
	1351 WM. H. TAFT	BLUE CROSS
	1358 MYRTLE	
	1635 MADISON	SW COR. HACKBERRY
	1740 MADISON	NW COR. FAIRFIELD
	2008 MADISON	NW COR. CINNAMON
	2047 MADISON	SW COR. TORRANCE
	2200 MADISON	NE COR. PAUL ST.
	2324 MADISON	NW COR. VISTA
	2259 DUCK CREEK	SW COR. POTOMAC
	2119 DANA	SE COR. REALISTIC
	2013 DANA	SE COR. EVANSTON
	DANA & MONTGOMERY, NEC	
1712	3643 MONTGOMERY	UDF
	3601 MONTGOMERY	SHELL
	3701 MONTGOMERY	CHEMICAL
	HERALD & WOODBURN, NWC	XAVIER UNIV.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	3822 WOODBURN	ZAVIER UNIV.
	3557 WOODBURN	G.A. GRAY CO.
	3437 MONTGOMERY	SW COR. DAUNER
	3304 MONTGOMERY	SW COR. HEWITT
	3235 GILBERT	SW COR. DIXMONT
	3149 WOODBURN	NW COR. FAIRFAX
	3027 WOODBURN	SW COR. GILPIN
	2846 WOODBURN	SW COR. CHAPEL
	BEECHER & GILBERT, NWC	SHELL
	LINCON & VICTORY PKWY.	NORTHWEST CORNER
<hr/>		
68		
1713	2235 LANGDON FARM	
	2200 LANGDON FARM	
	2709 LOSANTIVILLE	(AT ENGELWOOD)
	2732 LOSANTIVILLE	(AT FAIRHURST)
	2769 LOSANTIVILLE	(AT GIRARD)
	2902 LOSANTIVILLE	(AT BONVISTA)
	6065 MONTGOMERY	
	6032 MONTGOMERY	RESTAURANT

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	6010 MONTGOMERY	(AT LESTER)
	LESTER & GLOSS	
	LESTER & MAPLELEAF	
	4320 LESTER	VIC'S DELI
	5598 RIDGE	(AT MAPLELEAF)
	5820 RIDGE	(AT BELLWOOD)
	3179 WOODFORD	
	6098 MONTGOMERY	DRUG
	6100 RIDGE	
	6101 MONTGOMERY	
	6142 MONTGOMERY	IGA
	6201 MONTGOMERY	(AT KINCAID)
	6204 MONTGOMERY	WALGREEN'S
	6301 MONTGOMERY	(AT GRANDVISTA)
	6334 MONTGOMERY	
	6401 MONTGOMERY	
	6449 MONTGOMERY	
	6503 MONTGOMERY	(AT BANTRY)
	6650 MONTGOMERY	(AT REVENAL)

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
1714	EDWARDS & MARKBREIT, SEC	
	2684 MADISON	LaROSA
	2673 MADISON	BAKERY
	3661 EDWARDS	PONY KEG
	2646 ERIE	U-NAME-IT
	2639 ERIE	POST OFFICE
	2723 ERIE	BAKERY
	2724 ERIE	RESTAURANT
	2740 ERIE	AT MICHIGAN
	2800 ERIE @ SHAW	
	2870 ERIE @ MONEITH [SIC]	
	3433 MONTIETH	
	2838 OBSERVATORY	
	LINWOOD & CRYER	
	2661 OBSERVATORY	AT EDWARDS
	3443 EDWARDS	CHASE BANK
	2659 ERIE	DECKER DURG [SIC]
	2700 ERIE	'PURSE'
	3510 EDWARDS	ECHO RESTAURANT

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	2701 MADISON	
	2901 MADISON	AT HYDE PARK AVE.
	2972 MADISON	ARBY'S
	3006 MADISON	SUBWAY
	3027 MADISON	LAUNDRY
	3034 MADISON	OFFICE
	3038 MADISON	AT ALLISTON-BUS STOP
	3073 MADISON	BONA
1714	3089 MADISON	RESTAURANT
	3120 MADISON	HARDEE'S
	3135 MADISON	UDF
	3201 MADISON	GAS
	3184 MADISON	BAR
	3162 BROTHERTON	
	3025 ROBERTSON	
	2990 ROBERTSON	
	2794 ROBERTSON	
	3241 BROTHERTON	
	3268 BROTHERTON	PONY KEG
	MARBURG & PAXTON	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4639 RIDGE	PONDEROSA
	MILACRON-CAST FABRICATING	4701 MARBURG
	4701 MARBURG	CINTI MILACRON
	4912 DUCK CREEK	
	2942 WASSON	CLEANERS
	3661 PAXTON	
	3600 PAXTON	
<u>46</u>		
1715	2551 SPINDLE HILL	SPINDLE HILL APTS.
	SUFFOLK & CORBLY	
	6220 CORBLY	BUS STOP
	2244 BEECHMONT	CHILI
	BEECHMONT & CORBLY, SEC	DRUG
	BEECHMONT & CORBLY	REST.
	2111 BEECHMONT	
	6117 CAMPUS LA.	POST OFFICE
	SUTTON & CAMPUS LA.	BUS STOP
	SUTTON & BENNEVILLE, SEC	
	SUTTON & CAMBRIDGE, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	SUTTON & GLADE, NEC	
	1700 MEARS	SE COR. CAMBRIDGE
	1839 BEACON	
	CAMBRIDGE & BEACON, SEC	
	GLADE & BEACON, SWC	
<u>16</u>		
1723	7TH & WALNUT, NWC	SUPER X
	7TH & WALNUT, SWC	
	7TH & WALNUT, NEC	FRISCH'S
	120 E. 7TH ST.	OLYMPIC GARAGE
	7TH & MAIN, SWC	
	7TH & MAIN, SEC	BUS STOP
	628 SYCAMORE	
	607 SYCAMORE	ST. XAVIER-BUS STOP
	6TH & SYCAMORE, NWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	6TH & SYCAMORE, SEC	
	5TH & SYCAMORE, NWC	BUS STOP
	6TH & BROADWAY, SEC	BUS STOP
	6TH & BROADWAY, NEC	
	375 E. 6TH ST.	PROCTOR & GAMBLE
	6TH & MAIN, NEC	
	6TH & MAIN, SEC	
	6TH & MAIN, SWC	
	132 E. 6TH ST.	FRISCH'S
	119 E. 6TH ST.	LaROSA'S
	6TH & WALNUT, NEC	
	6TH & WALNUT, NWC	
	6TH & WALNUT, SWC	
	30 E. 6TH ST.	McDONALD'S
	6TH ST. ARCADE	
	6TH & VINE, NEC	BUS STOP
	8TH & MAIN, SEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	8TH & MAIN, NEC	
	9TH & MAIN, SEC	
	9TH & MAIN, NEC	
	COURT & MAIN, SEC	
	128 E. COURT ST.	COUNTY ADMIN. BLDG.
	COURT & WALNUT, SWC	
	125 E. COURT ST.	POST BUILDING
	9TH & WALNUT, NWC	
	9TH & WALNUT, SEC	YMCA
	8TH & WALNUT, NWC	
	210 E. 6TH ST.	BUSKINS
	GANO ALLEY & WALNUT ST.	PARKING GARAGE
	GANO ALLEY & WALNUT-BUS	
	5TH & WALNUT, NEC	
	5TH & WALNUT, SEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	5TH & WALNUT, SWC	
	321 MAIN	C G & E
	4TH & MAIN, SEC	
	4TH & MAIN, SWC	C G & E
	131 E. 4TH ST.	
	125 E. 4TH ST.	ARCADE
	4TH & WALNUT, NWC	
	4TH & WALNUT, SWC	
	19 E. 4TH ST.	
	18 E. 4TH ST.	
	121 E. 5TH ST.	WALGREENS
	5TH & MAIN, SWC	
	5TH & MAIN, NEC	POST OFFICE
	5TH & MAIN, SEC	
	5TH & BROADWAY, SEC	
	400 PIKE	POLK BLDG.
	500 E. 4TH ST.	BUS STOP
	4TH & SYCAMORE, NEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4TH & SYCAMORE, SWC	
	225 E. 4TH ST.	A T & T
	4TH ST. WENDY'S	
	4TH & MAIN, NEC	
	5TH & MAIN, NWC	POST OFFICE
	550 MAIN	FEDERAL BLDG.
	621 MAIN	FT. WASHINGTON HOTEL
	7TH & SYCAMORE, NEC	
	800 BROADWAY	BURKE BLDG.
	826 BROADWAY	BOARD OF ELECTIONS
	9TH & SYCAMORE	JUSTICE CENTER
	9TH & SYCAMORE, NWC	
	CENTRAL PKWY. & MAIN, SEC	
	CENTRAL PKWY. & SYCAMORE	SOUTHWEST CORNER
	SYCAMORE & READING, SWC	

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<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	222 E. CENTRAL PKWY.	ALMS & DOEPKE BLDG.
	CENTRAL PKWY. & WALNUT	NORTHEAST CORNER
	COURT & WALNUT, NEC	
	COURT & SYCAMORE	JAIL
	8TH & SYCAMORE, NWC	
	RIVERFRONT STADIUM- WALKWAY	
	RIVERFRONT COLISEUM	PLAZA LEVEL
	NORTHEAST PLAZA	RIVERFRONT STADIUM
	SOUTHEAST PLAZA	RIVERFRONT STADIUM
	SOUTHWEST PLAZA	RIVERFRONT STADIUM
	NORTHWEST PLAZA	RIVERFRONT STADIUM
	GATE 3	RIVERFRONT STADIUM

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<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
1724	7TH & CENTRAL, NWC	CENTENNIAL PLAZA
	800 CENTRAL AVE.	CITY HALL
	9TH & CENTRAL	BUSKIN BAKERY
	9TH & CENTRAL, SWC	
	CENTRAL AVE. & COURT, SWC	
	COURT & PLUM, SEC	
	9TH & PLUM, SEC	
	7TH & PLUM, SEC	
	GEORGE & PLUM	PARKING LOT
	7TH & ELM, SWC	
	7TH & ELM, NWC	
	7TH & ELM, NEC	
	7TH & ELM, SEC	
	135 W. 7TH ST.	LAZARUS-BUS STOP
	7TH & RACE, NWC	
	7TH & RACE, NEC	
	7TH & RACE, SWC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	7TH & VINE, SWC	SKYLINE
	6TH & VINE, SEC	KY. FRIED CHICKEN
	6TH & VINE, SWC	DELTA AIRLINES
	6TH & VINE, NWC	CINCINNATIAN HOTEL
	6TH & RACE, NEC	
	6TH & RACE, SWC	WALGREENS
	6TH & ELM, NWC	
	6TH & ELM, NEC	
	6TH & ELM, SWC	
	SHILLITO PL. & RACE	
	525 RACE	SKYWALK-BUS STOP
	124 W. CONVENTION WAY	EGG CETERA- SKYWALK
	508 RACE- ON SKYWALK	ROY ROGERS
	5TH & RACE, NEC	
	5TH & RACE, SWC	SAKS FIFTH AVE
	450 RACE	ARCADE
	4TH & RACE, NEC	
	4TH & RACE, SEC	FRISCH'S

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4TH & ELM, SWC	
	4TH & PLUM, SEC	
	McFARLAND & PLUM	
	3RD & PLUM, NEC	
	4TH & CENTRAL, NEC	
	5TH & PLUM, SEC	
	5TH & PLUM, SWC	
	5TH & ELM, SEC	
	5TH & PLUM, NEC	
	5TH & ELM, NWC	
	30 W. 5TH ST.	
	5TH & VINE, NWC	
	5TH & VINE	CAREW TOWER ARCADE
	5TH & RACE, SEC	
	4TH & VINE, SWC	
	4TH & VINE, NEC	
	13 W. 4TH ST,	McALPINS
	3RD & RACE, SEC	
	3RD & VINE	PARKING GARAGE

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	309 VINE	
	4TH & VINE, SEC	
	525 VINE	CITIZENS FEDERAL
	617 VINE	ENQUIRER BLDG.
	630 VINE	WENDY'S
	626 VINE	SPORTS PAGE REST.
	7TH & VINE, NEC	
	717 VINE	BISTRO ON VINE
	8TH & VINE, SEC	
	8TH & RACE, NEC	
	19 GARFIELD PL.	PRESIDENTIAL PLAZA
	8TH & VINE, NWC	GARFIELD HOUSE
	9TH & VINE, SEC	
	9TH & VINE, NEC	
	COURT & VINE, SEC	
	1000 VINE	KROGER BLDG.
	1007 VINE	SKYLINE CHILI
	12TH & VINE, SEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	CENTRAL PKWY & RACE, SEC	AAA
	9TH & RACE, NWC	
	GARFIELD & ELM, SEC	
	8TH & ELM, NWC	
	9TH & ELM, SEC	
	GARFIELD & RACE, SWC	
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	78	
1728	PETE ROSE WAY & RACE	
	PETE ROSE WAY & PLUM	FLANNIGAN'S
	PETE ROSE WAY & VINE	
	PETE ROSE WAY & WALNUT	
	PETE ROSE WAY & MAIN	
	PETE ROSE WAY & BROADWAY	NORTHWEST CORNER
	COLISEUM STEPS	PETE ROSE WAY

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	537 E. PETE ROSE WAY	MIDLAND CO.
	PETE ROSE WAY & EGGLESTON	NORTHWEST CORNER
	PETE ROSE & EGGLESTON, SWC	SAWYER PT. PARKING
	3RD & CULVERT, NEC	
	5TH & CULVERT, NEC	
	6TH & SENTINEL, SWC	PROCTOR & GAMBLE
	8TH & EGGLESTON, NWC	
	GILBERT & BROADWAY, NEC	
	COURT & GILBERT, NWC	GREYHOUND TERMINAL
	2720 EASTERN	SUNOCO
	400 DELTA	YMCA
	451 DELTA	BUS STOP
	611 DELTA	
	797 DELTA	ALPINE APTS.
	828 DELTA	CITIZENS FEDERAL
	1004 DELTA	HOME HEALTH DRUGS

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	3172 LINWOOD	UDF
	3175 LINWOOD	SPREEN PHARMACY
	DELTA & LINWOOD	VIDEO STORE
	1032 DELTA	BOARDWALK HOBBIES
	DELTA & HARDISTY	
	DELTA & NILLES, NWC	
	DELTA & OBSERVATORY, SEC	
	DELTA & ERIE, SWC	
	TARPIS & ERIE, NEC	
	3350 ERIE	UDF
	3378 ERIE	PONY KEG
	3411 ERIE	APRATMENTS [sic]
	3414 ERIE	AT AMBERSON
	3506 ERIE	AT PINEHURST
	3566 ERIE	AT BRENTWOOD
	3668 ERIE	AT SAYBROOK
	ASHWORTH & ERIE, SEC	

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	ROSSLYN & ERIE, NWC	SOHIO
	5983 ROSSLYN	APRATMENTS [sic]
	3932 BROTHERTON	AT ROMAINE
	4220 ALLENDORF	APARTMENTS
	3715 BROTHERTON	AT ALLENDALE
	3615 BROTHERTON	AT PAXTON WOODS
	3905 BROTHERTON	STOP-N-GO
	HEEKEN & EASTERN, NEC	
	LINWOOD & EASTERN, NWC	
	4575 EASTERN	MULTI-COLOR
	4565 EASTERN	MULTI-COLOR (OFFICE)
	LUNKEN AIRPORT- MAIN TERM.	WILMER & AIRPORT RD.
	EASTERN & McCULLOUGH	NORTHEAST CORNER
	3923 EASTERN	POST OFFICE
	ILLEGIBLE	CHURCH
	ILLEGIBLE	NORTHEAST CORNER

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	ILLEGIBLE	NORTHEAST CORNER
	ILLEGIBLE PKWY.	NORTHWEST CORNER
	??	
1729	EBERSOLE & MADISON, NEC	
	WHETSEL & MADISON, SEC	
	5908 MADISON	POST OFFICE
	MATHIS & MADISON, SEC	
	KENWOOD & MADISON, NWC	
	6415 MADISON	BONDED GAS
	6500 MADISON	AT ROANOKE
	4703 PLAINVILLE	(AT BUCKINGHAM)
	4500 PLAINVILLE	N.E. CORNER- WINDWARD
	4400 PLAINVILLE	N.E. CORNER- BRITTON
	4317 PLAINVILLE	S.W. CORNER- PALMETTO
	4306 PLAINVILLE	BUS STOP
	4024 PLAINVILLE	N.W. COR. CAMBRIDGE

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	4002 PLAINVILLE	CHILI COMPANY
	6750 BRAMBLE	APARTMENTS
	6501 BRAMBLE	(AT SETTLE)
	6017 BRAMBLE	(AT WATTERSON)
	5901 BRAMBLE	(AT WHETSEL)
	5665 BRAMBLE	(AT CONANT)
	4348 ERIE	(AT MACEY)
	4527 ERIE	(AT MANNING)
	7458 MONTGOMERY	(AT STEWART)
<hr/>		
22		
1730	5383 N. BEND	BONDED
	3295 N. BEND	CLARK
	CHEVIOT & TALLAHASSEE	NORTHEAST CORNER
	3325 W. GALBRAITH	POST OFFICE
	8375 COLERAIN	WHITE OAK REST.
	COLERAIN & ROUNDTOP	
	NORTHGATE MALL- BUS STOP	SPRINGDALE RD.

<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	3106 SPRIGDALE [SIC]	ANGELO'S RESTAURANT
	HAMILTON & ROOSEVELT, NEC	BUS STOP
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9		
1733	SHERMAN & DALTON	POST OFFICE
	LIBERTY & DALTON-ENTRANCE	POST OFFICE
	LIBERTY & DALTON-GUARD	POST OFFICE
	KENNER & DALTON, NWC	
	1125 W. 8TH ST.	PITNEY-BOWES
	939 W. 8TH ST.	CREDIT UNION
	500 GEST ST.	UNITED PARCEL
	800 LINN ST.	HUDUPOHL
	W. 8TH & LINN ST.	CHEVRON
	1250 W. 8TH ST.	LaROSA'S
	W. 8TH & DEPOT	NORTHEAST CORNER
	W. 8TH & STATE	NORTHEAST CORNER
	2490 RIVER RD.	MT. HOPE

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<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	2857 RIVER RD.	SUPER AMERICA
	RIVER RD. & DELHI	NORTHWEST CORNER
	RIVER RD. & HILLSIDE	SOUTHWEST CORNER
	RIVER RD. & LILLENTHAL	NORTHWEST CORNER
	RIVER RD. & ANDERSON FERRY	SOHIO
	BEECHMEADOW & WILNET, SEC	
	CLEVES-WARSAW & LAMAR, NEC	
	SIDNEY & LIONA, SWC	
	GLENMORE NEAR GLENWAY	MEDICAL BLDG.
	5880 GLENWAY	BRIDAL SHOP
	GLENWAY & WERK	SOHIO
	GLENWAY & WERK, SWC	
	6131 GLENWAY	HARDEE'S

	361	
<u>RTE</u>	<u>ADDRESS</u>	<u>LOCATION</u>
	6243 GLENWAY	WENDY'S
	WESTBOURNE & GLENWAY, SEC	

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Total Records Displayed: 886

EXHIBIT 16

Administrative Regulation (NO.) 67 (DATE) May 31, 1991

OFFICE OF THE CITY MANAGER

CITY OF CINCINNATI

SUBJECT: NEWSRACKS IN THE PUBLIC RIGHT-OF-WAY

(REPEALS ADM. REG. NO. DATED) /s/ Gerald E. Newfarmer

PURPOSE

In accordance with Section 911-7 of the Cincinnati Municipal Code, the following rules and regulations for newsracks in the public right-of-way are promulgated to protect the public safety and welfare and reasonable use of the streets by vehicular and pedestrian traffic. This Administrative Regulation is divided into two (2) sections: 1) City of Cincinnati and 2) the Downtown Central Business District.

The Downtown Central Business District is defined by the boundary of the Downtown Cincinnati "2000" Plan. (Map attached)

Separate regulations and guidelines will be developed for individual neighborhood business districts.

SECTION I. CITY OF CINCINNATI

1. No person shall install or maintain any newsrack within the public right-of-way without first applying for a permit for the newsrack with the Director of Public Works. The application shall be in the form of Exhibit A and shall be renewed annually by July 1. The Director shall approve or disapprove the application within five

(5) business days. A person whose application for a permit has been denied may request review by the City's Sidewalk Board of Appeals.

Applications submitted for new newsracks to be installed following the acceptance of this Regulation must include a completed application in the form of Exhibit A and a copy of the publication. The Director will approve or disapprove the application within ten (10) business days.

2. All persons, partnerships or corporations operating newsracks must provide the Director of Public Works with a location inventory of such devices located within the public right-of-way annually by July 1. The location inventory shall consist of a listing of locations.
3. Each newsrack shall be maintained in a neat and clean condition and in good repair at all times so that:
 - a. It is reasonably free of dirt and grease.
 - b. It is reasonably free of chipped, faded, peeling and cracked paint in the visible painted areas thereof.
 - c. It is reasonably free of rust and corrosion in the visible unpainted metal areas thereon.
 - d. The clear plastic or glass parts thereof, if any, through which the publications therein are viewed are unbroken and reasonable [sic] free of cracks, dents, blemishes and discoloration.
 - e. The paper or cardboard parts or inserts thereof are reasonable [sic] free of tears, peeling or fading.
 - f. The structural parts thereof are not broken or unduly misshapen.

g. No advertising media shall appear on the newsrack except the name and price of the publication and promotion of the publication.

The graphics for the price shall be limited to one-inch (1") high letters and be allowed to be in only one location, the front of the box facing the sidewalk.

4. If upon written notification or such other method of notification consistent with an emergency the permittee of a newsrack fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the newsrack shall be removed from the right-of-way and the permittee shall be billed for the cost of removal and storage of the device. In all non-emergency situations, the permittee shall have five business days to request an opportunity to object to the order to remedy violations. The objection of the permittee shall be heard by the Sidewalk Board of Appeals within five business days of the request.

5. Newsracks outside the Central Business District may be attached to utility, light, or traffic control poles provided that all cables or chains are covered with plastic sleeves or protective coating to the satisfaction of the City. This shall be completed city wide by December 31, 1991.

6. Newsracks shall be placed in the 'collector strip' where possible which is the zone approximately three (3') ft. wide parallel to the curb.

7. Each permittee shall assume all responsibility for damage caused by acts or omissions of the permittee for the repair of the sidewalk or other City Property to the

City's satisfaction. Each permittee shall be responsible for restoring the sidewalk or other property to the City's satisfaction if for any reason a newsrack is removed. Each permittee shall obtain a performance bond to the satisfaction of the City in the amount of \$10,000 per calendar year to insure repair of any damages to the sidewalk or other property.

8. Each permittee shall indemnify and hold harmless the adjacent property owner and the City of Cincinnati from damage resulting from the installation of its newsracks. In addition, each permittee shall file with the Director of Public Works proof of current comprehensive liability insurance for its newsracks.

9. Newsracks *shall not* be located to obstruct the reasonable use of the following:

- a. Bus stops;
Newsracks may be located within bus stop zones but should not be placed so as to block the front or rear door of the buses.
- b. Front doors of major buildings; offices, hotels, department stores;
- c. Parking spaces, parking meter posts;
Newsracks may be located within parking zones and metered spaces if no other alternative is available. The boxes should, if possible, be placed at the rear of the parking space to not block car doors.
- d. Cross walks;
- e. Fire hydrants and boxes;

- f. Pull boxes for City light poles;
- g. Utility boxes such as water, sewer, gas, telephone;
- h. Handicapped ramps;
- i. Sign stanchions;
- j. Truck loading zones, taxi-cab stands;
Where no other space is available, newsracks may be placed in loading zones if the row consists of no more than 3 newsracks and it is located to not interfere with vehicle doors and loading.
- k. City licensed vendor locations, within four (4) feet of either side; and
- l. Other locations presenting danger to the safety and welfare of persons using the right-of-way or creating a public nuisance.

SECTION 2 DOWNTOWN - CENTRAL BUSINESS DISTRICT

All the guidelines for the City of Cincinnati (Section 1) apply to the Downtown-Central Business District.

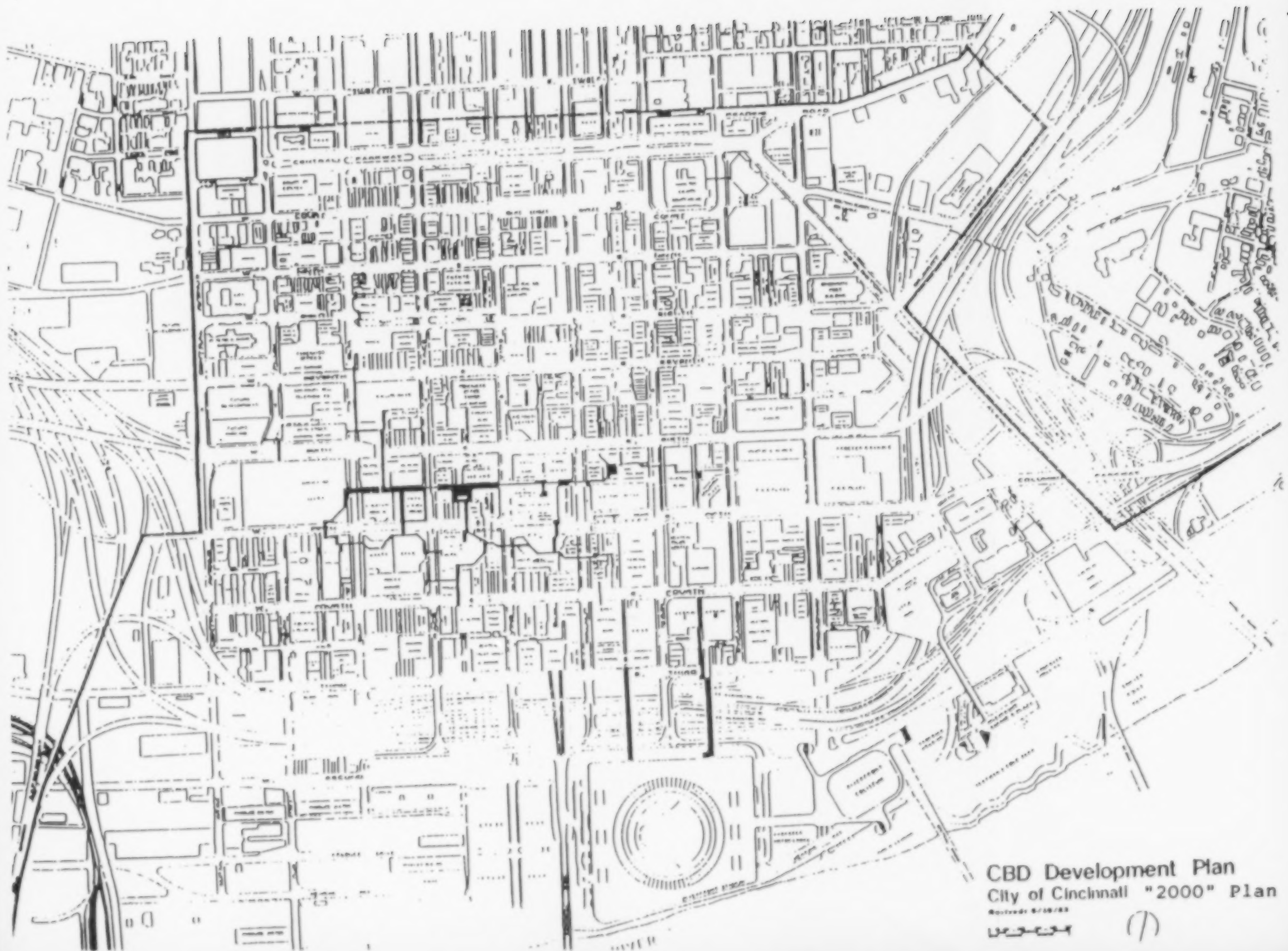
1. Newsracks shall, where possible, be placed in the "collector strip" on sidewalks where paving patterns exist. The newsracks shall be aligned in a row of not more than five (5) in one location and ideally in separate groupings of two (2) or three (3) to not impede pedestrian flow. The row shall be placed behind the first City light or traffic pole a distance of at least 5'0". The boxes shall be spaced a minimum distance of 1'6" (18") from the outside

face of the curb and shall align with paving joints in all locations.

2. No more than two (2) newsracks in one location may contain commercial handbills as defined by Section 714-1-C of the Cincinnati Municipal Code unless there are vacant positions. The third and subsequent commercial handbill dispensing devices will be displaced when newspapers are granted permits for these positions.
3. All newsracks in the public right-of-way shall be the K-80, the K-500, the Gansat.
4. All newsracks at a location shall be aligned in a row and be spaced approximately four inches apart. All taller boxes, such as the K-500s and the Gansat shall be grouped together and be on one end of the row. The other boxes (K-80) shall also be adjacent to each other.
5. All newsracks shall be bolted to the sidewalk using stainless steel sleeves and bolts and/or threaded rods. Where newsracks have been removed, the stainless steel sleeves embedded in the sidewalk shall be capped with threaded caps.
6. Newsracks that are installed after the original locations are established shall be placed in the center of a row. The company installing a new newsrack shall be responsible for realigning the other newsracks at its expense.
7. For *Skywalk* locations, newsracks shall be located only in areas of greater width than the standard 15'0" right-of-way, such as building lobbies, plazas, arcades, etc. All newsracks shall be aligned in single rows along building walls.

8. It is City policy to only permit the use of the K-80 newsrack or its equivalent within new development blocks, public arcades, skywalks, and other locations not in the street right-of-way.

THIS REGULATION SHALL BE EFFECTIVE UPON
DATE OF APPROVAL BY THE CITY MANAGER.



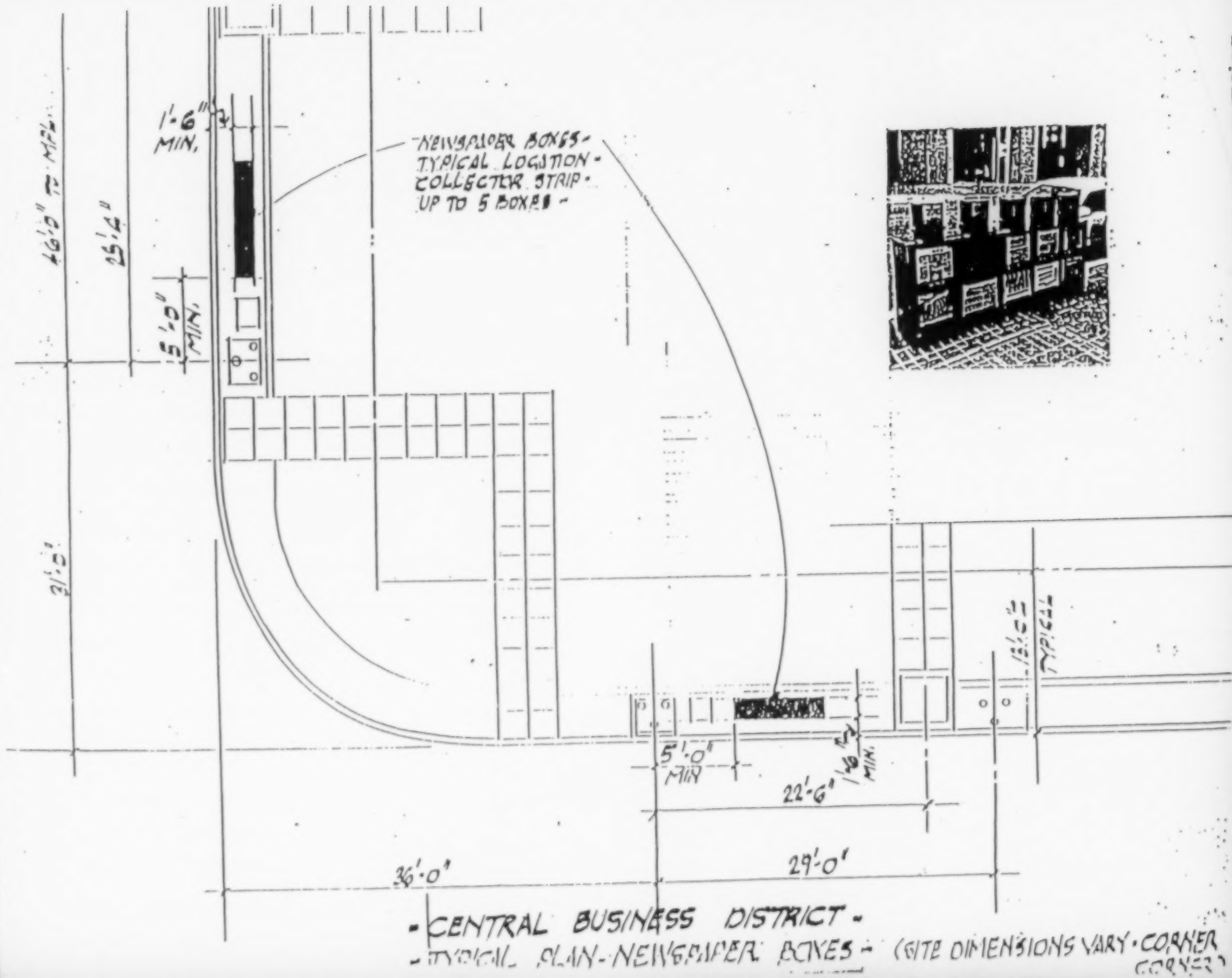


EXHIBIT A

CITY OF CINCINNATI
DEPARTMENT OF PUBLIC WORKS
APPLICATION TO PLACE NEWSRACKS IN
PUBLIC RIGHT-OF-WAY

Date: _____

Check One and Complete All Information:

Annual Renewal Yes ___ Year ___ No ___ or New Application ___

If Yes, No. of Dispensing Devices Covered: ___ Attach location list.

Proof of Liability Attached:

Yes ___ No ___ Prev. Submitted ___

Expiration Date: ___

Proof of Performance Bond Attached

Yes ___ No ___ Prev. Submitted ___

Expiration Date: ___

The proof of current Liability Insurance and Performance Bond must be attached or on file with the City of Cincinnati for your application to be considered complete.

Please Complete All Information:

1. Owner of Newsracks: _____
2. Name of Publication: _____
3. a. Name and Title of Local Authorized Representative:
b. Address:
c. Telephone Number: _____
4. Frequency of Publication: _____

NEW APPLICATIONS ONLY:

New Publication:

Yes: ___ No: ___ If Yes,
Attach Copy of Publication

1. Type of Vending Box(s):
(Submit photo, drawing and specs)
2. Proposed Location(s):
(Specific address):
3. Proposed Date(s) of Placement:
4. Diagram of Location(s):
(intersection, corner, etc.)

Owner: _____

Date _____, 19__

By: _____
Local Authorized Rep. Of Owner

EXHIBIT 17

City of Cincinnati

[SEAL]

Interdepartment
Correspondence Sheet

Date 3/20/92

To Bill Knecht, Deputy City Manager's Office
From T.E. Young, P.E., City Engineer
Copies to Castellini-Dep. City Mgr., Richardson-A&FM, Ganulin-Law, Reifel-ETS, Parker/Rebel-ETS, Adm. File, TEY/Eng. File
Subject Revision to Administrative Regulation #67
- Newsrack Regulations

Please find attached is the proposed revised Administrative Regulation #67 with the required map and exhibits.

The specified revisions are as follows:

SECTION 2 DOWNTOWN - CENTRAL BUSINESS DISTRICT

3. All newsracks in the public right-of-way shall be the K-80, the K-500 or the Gansat.

The words "or City approved equivalent" have been eliminated.

SECTION 1 CITY OF CINCINNATI

1. Sentence 3 - The Director will approve or disapprove the application within ten (10) business days.

The word "five (5)" was changed to "ten (10)."

Also, on October 11, 1991, the United States Court of Appeals for the Sixth Circuit rendered their decision in 'Discovery Network, Inc. and Harmon Publishing Co. vs. City of Cincinnati' in favor of Discovery Network. This decision, in effect, stated that commercial publications cannot be classified separate from any newspaper in the assigning of locations.

Therefore, the following item has been deleted and the remaining items renumbered.

SECTION 2 DOWNTOWN - CENTRAL BUSINESS DISTRICT

2. No more than two (2) newsracks in one location may contain commercial handbills, as defined by Section 714-1-C of the Cincinnati Municipal Code, unless there are vacant positions. The third and subsequent commercial handbill dispensing devices will be displaced when newspapers are granted permits for these positions.

Following discussions with Councilman John Mirlisena and the local newspaper distributors the following item has been revised.

The item previously read:

SECTION 1 - CITY OF CINCINNATI

5. Newsracks outside the Central Business District may be attached to utility, light, or traffic control poles provided that all cables or chains are covered with plastic sleeves or protective coating to the satisfaction of the City. This shall be accomplished by December 12, 1992.

The item now reads:

5. All newsracks shall be bolted or securely attached to the ground so that they are not movable. This is to be accomplished by 2/28/94. In the interim, outside the Central Business District, newsracks may be attached to utility, light, or traffic control poles by chain or cable provided that all chains and cables are covered with plastic sleeves or protective coating to the satisfaction of the City.

If you require additional information, please contact my office on line 3401.

Administrative Regulation (NO.) 67 (DATE) April 1, 1992

OFFICE OF THE CITY MANAGER

CITY OF CINCINNATI

SUBJECT: NEWSRACKS IN PUBLIC
RIGHT OF WAY

APPROVED:

REPEALS ADM. NO.

DATED

Gerald E. Newfarmer

PURPOSE

In accordance with Section 911-7 of the Cincinnati Municipal Code, the following rules and regulations for newsracks in the public right-of-way are promulgated to protect the public safety and welfare and reasonable use of the streets by vehicular and pedestrian traffic. This Administrative Regulation is divided into two (2) sections: 1) City of Cincinnati and 2) the Downtown Central Business District.

The Downtown Central Business District is defined by the boundary of the Downtown Cincinnati "2000" Plan. (Map attached)

Separate regulations and guidelines will be developed for individual neighborhood business districts.

SECTION I. CITY OF CINCINNATI

1. No person shall install or maintain any newsrack within the public right-of-way without first applying for a permit for the newsrack with the Director of Public Works. The application shall be in the form of Exhibit A and shall be renewed annually by July 1. The Director shall approve or disapprove the application within ten (10) business days. A person whose application for a permit has been denied may request review by the City's Sidewalk Board of Appeals.

Applications submitted to install new newsracks in the right-of-way following the acceptance of this Regulation must include a completed application in the form of Exhibit A. The Director will approve or disapprove the application within ten (10) business days.

2. All persons, partnerships or corporations operating newsracks must provide the Director of Public Works with a location inventory of such devices located within the public right-of-way annually by July 1. The location inventory shall consist of a listing of locations.

3. Each newsrack shall be maintained in a neat and clean condition and in good repair at all times so that:

- a. It is reasonably free of dirt and grease.
- b. It is reasonably free of chipped, faded, peeling and cracked paint in the visible painted areas thereof.
- c. It is reasonably free of rust and corrosion in the visible unpainted metal areas thereon.
- d. The clear plastic or glass parts thereof, if any, through which the publications therein are viewed are unbroken and reasonable free of cracks, dents, blemishes and discoloration.
- e. The paper or cardboard parts or inserts thereof are reasonable free of tears, peeling or fading.
- f. The structural parts thereof are not broken or unduly misshapen.
- g. No advertising media shall appear on the newsrack except the name and price of the publication and promotion of the publication.

4. If upon written notification or such other method of notification consistent with an emergency the permittee of a newsrack fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the newsrack shall be removed from the right-of-way and the permittee shall be billed for the cost of removal and storage of the device. In all non-emergency situations, the permittee shall have five business days to request an opportunity to object to the order to remedy violations. The objection of the permittee shall be heard by the Sidewalk Board of Appeals within five business days of the request.

5. All newsracks shall be bolted or securely attached to the ground so that they are not moveable. This is to be accomplished by 2/28/94. In the interim, outside the Central Business District, newsracks may be attached to utility, light, or traffic control poles by chains or cable provided that all chains and cables are covered with plastic sleeves or protective coating to the satisfaction of the City.

6. Newsracks shall be placed in the 'collector strip' where possible which is the zone approximately three (3') ft. wide parallel to the curb.

7. Each permittee shall assume all responsibility for damage caused by acts or omissions of the permittee for the repair of the sidewalk or other City Property to the City's satisfaction. Each permittee shall be responsible for restoring the sidewalk or other property to the City's satisfaction if for any reason a newsrack is removed. Each permittee shall obtain a performance bond to the satisfaction of the City in the amount of \$10,000 per calendar year to insure repair of any damages to the sidewalk or other property.

8. Each permittee shall indemnify and hold harmless the adjacent property owner and the City of Cincinnati from damage resulting from the installation of its newsracks. In addition, each permittee shall file with the Director of Public Works proof of current comprehensive liability insurance for its newsracks.

9. Newsracks shall not be located to obstruct the reasonable use of the following:

a. Bus stops;

Newsracks may be located within bus stop zones but should not be placed so as to block the front or rear door of the buses.

b. Front doors of major buildings; offices, hotels, department stores;

c. Parking spaces, parking meter posts;

Newsracks may be located within parking zones and metered spaces if no other alternative is available. The boxes should, if possible, be placed at the rear of the parking space to not block car doors.

d. Cross walks;

e. Fire hydrants and boxes;

f. Pull boxes for City light poles;

g. Utility boxes such as water, sewer, gas, telephone;

h. Handicapped ramps;

i. Sign stanchions;

j. Truck loading zones, taxi-cab stands;

Where no other space is available, newsracks may be placed in loading zones if the row consists of no more than 3 newsracks and it is located to not interfere with vehicle doors and loading.

k. City licensed vendor locations, within four (4) feet of either side; and

l. Other locations presenting danger to the safety and welfare of persons using the right-of-way or creating a public nuisance.

SECTION 2 DOWNTOWN - CENTRAL BUSINESS DISTRICT

All the guidelines for the City of Cincinnati (Section 1) apply to the Downtown-Central Business District.

1. Newsracks shall, where possible, be placed in the "collector strip" on sidewalks where paving patterns exist. The newsracks shall be aligned in a row of not more than five (5) in one location and ideally in separate groupings of two (2) or three (3) to not impede pedestrian flow. The row shall be placed behind the first City light or traffic pole a distance of at least 5'0". The boxes shall be spaced a minimum distance of 1'6" (18") from the outside face of the curb and shall align with paving joints in all locations.
2. All newsracks in the public right-of-way shall be the K-80, the K-500, and Gansat.
3. All newsracks at a location shall be aligned in a row and be spaced approximately four inches apart. All taller boxes, such as the K-500s and the Gansat shall be grouped together and be on one end of the row. The other boxes (K-80) shall also be adjacent to each other.
4. All newsracks shall be bolted to the sidewalk using stainless steel sleeves and bolts and/or threaded rods. Where newsracks have been removed, the stainless steel sleeves embedded in the sidewalk shall be capped with threaded caps.
5. Newsracks that are installed after the original locations are established shall be placed in the center of a row. The company installing a new newsrack shall be

responsible for realigning the other newsracks at its expense.

6. For *Skywalk* locations, newsracks shall be located only in areas of greater width than the standard 15'0" right-of-way, such as building lobbies, plazas, arcades, etc. All newsracks shall be aligned in single rows along building walls.
7. It is City policy to only permit the use of the K-80 newsrack or its equivalent within new development blocks, public arcades, skywalks, and other locations not in the street right-of-way.

THIS REGULATION SHALL BE EFFECTIVE UPON DATE OF APPROVAL BY THE CITY MANAGER.

CITY OF CINCINNATI
DEPARTMENT OF PUBLIC WORKS
APPLICATION TO PLACE NEWSRACKS IN
PUBLIC RIGHT-OF-WAY

Date: ____

Check One and Complete All Information:

Annual Renewal Yes___ Year___ No___or New Application ___

If Yes, No. of Dispensing Devices Covered: ___ Attach location list.

Proof of Liability Attached: Yes___ No___ Prev. Submitted___

Expiration Date: ____

Proof of Performance Bond Attached Yes___ No___ Prev.
Submitted___

Expiration Date: ____

The proof of current Liability Insurance and Performance Bond must be attached or on file with the City of Cincinnati for your application to be considered complete.

Please Complete All Information:

1. Owner of Newsracks:
2. Name of Publication:
3. a. Name and Title of Local Authorized Representative:
- b. Address:
- c. Telephone Number:
4. Frequency of Publication:

NEW APPLICATIONS ONLY:

New Publication: Yes:___ No:___ If Yes, Attach Copy of Publication

1. Type of Vending Box(s): (Submit photo, drawing and specs)
2. Proposed Location(s): (Specific address):
3. Proposed Date(s) of Placement:

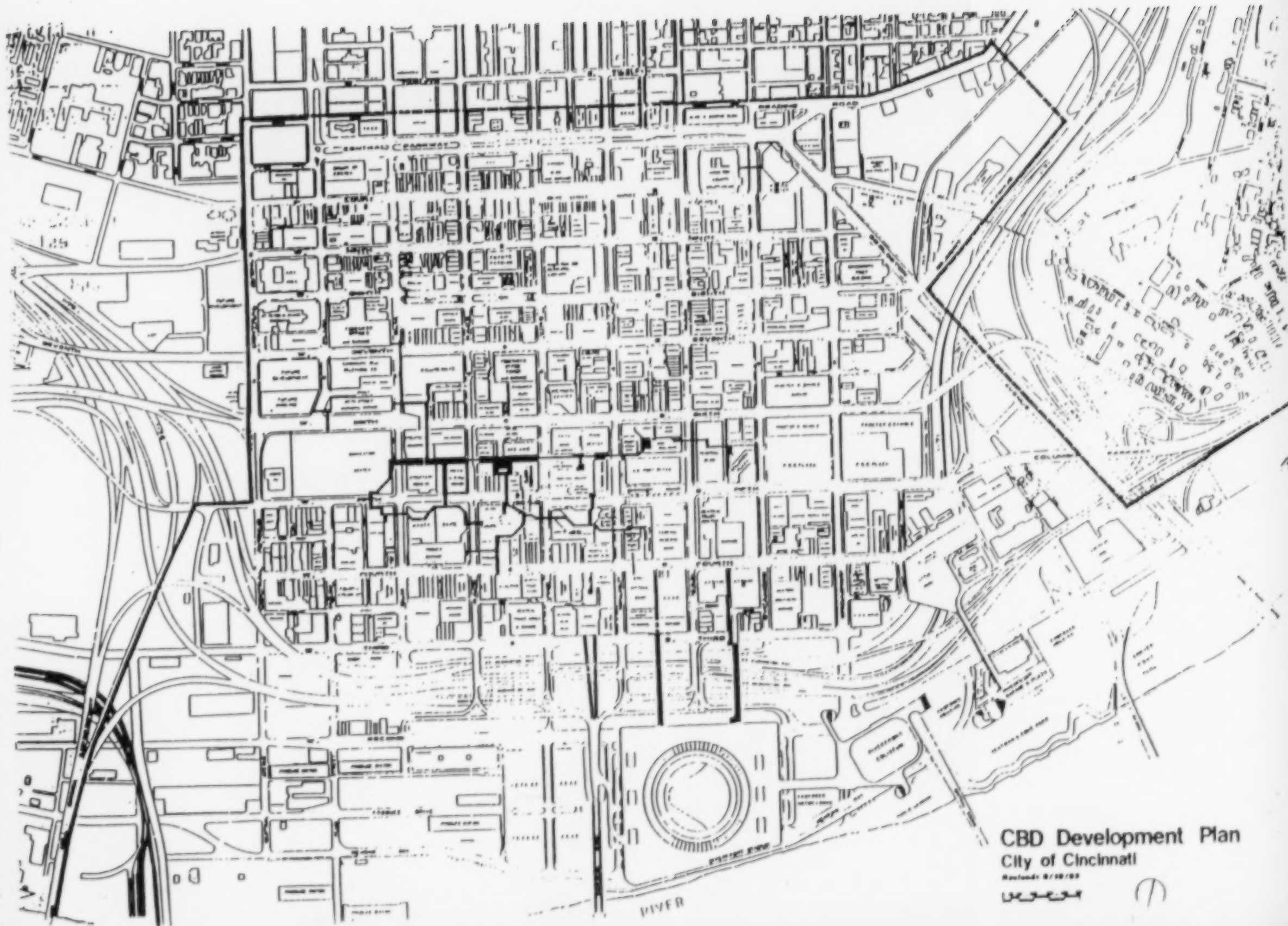
4. Diagram of Location(s): (intersection, corner, etc.)

Date __, 19__

Owner: _____

By: _____

Local Authorized Rep. of Owner

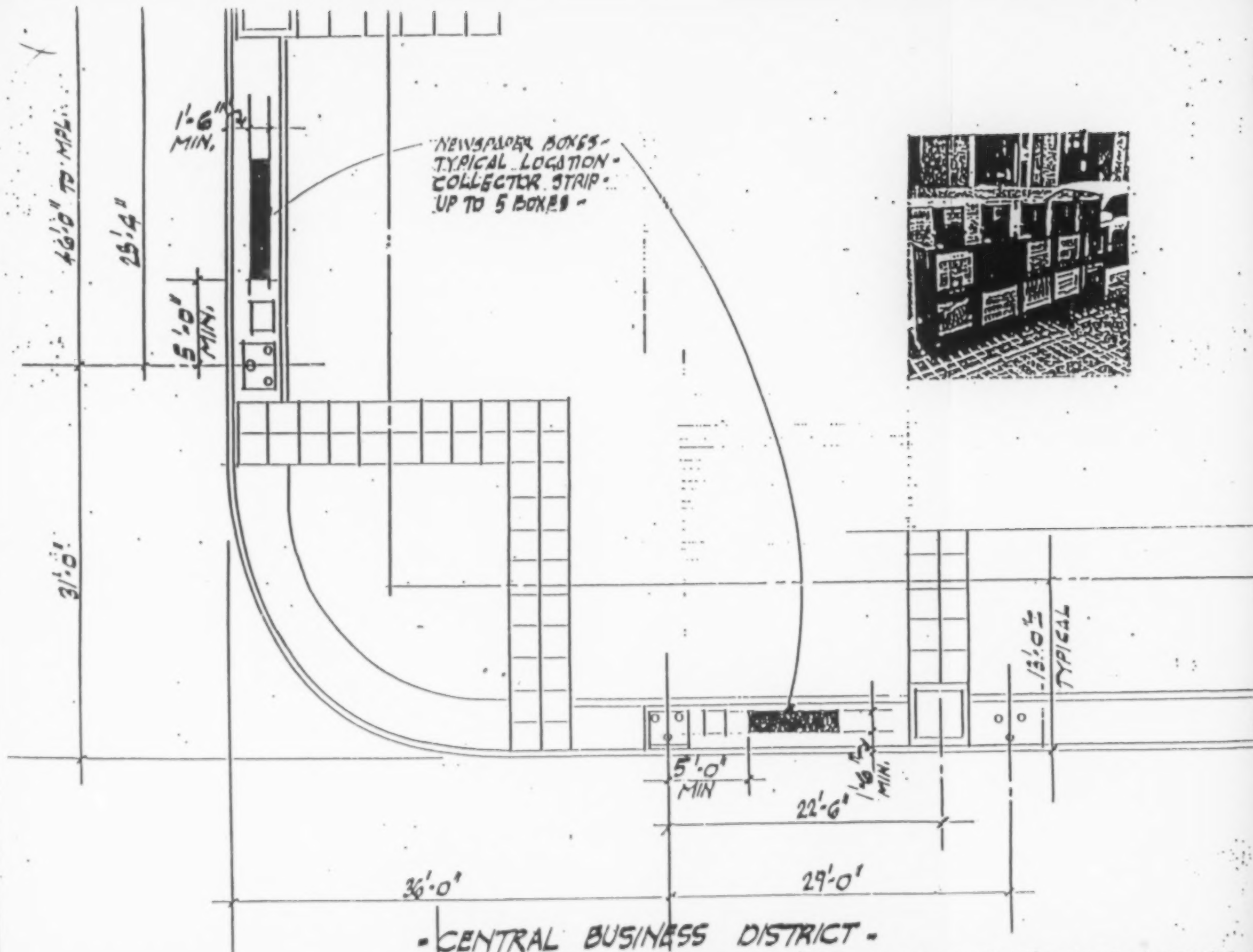


CBD Development Plan
City of Cincinnati

Revised: 9/18/83

0 100 200
Feet





- CENTRAL BUSINESS DISTRICT -

- TYPICAL PLAN-NEUTRONIC ACTIVES - (SITE DIMENSIONS VARY - CORNER

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EXHIBIT 18

MARTIN M. JAKUSEK
SALES REPRESENTATIVE

600 VINE, SUITE 402
CINCINNATI, OH 45202

DOW JONES & COMPANY, INC.
THE WALL STREET JOURNAL

TELEPHONE
(513) 381-6831

THE WALL STREET JOURNAL

#:	LOCATION:	LOCATION:	SERIAL NO:	MANUFACTURER:	MODEL:	OW
1	THE DINER	12TH & SYCAMORE	85-40614	KASPAR	K-80	DJ
2	COUNTY JUSTICE BLDG	1000 SYCAMORE	85-40611	KASPAR	K-80	DJ
3	NORTHEAST CORNER	4TH & BROADWAY	85-93847	KASPAR	K-80	DJ
4	NORTHEAST CORNER	4TH & SYCAMORE	85-93948	KASPAR	K-80	DJ
5	SOUTHWEST CORNER	4TH & MAIN	85-11409	KASPAR	K-100	DJ
6	NORTHEAST CORNER	4TH & WALNUT	85-36660	KASPAR	K-80	DJ
7	NORTH SIDE (FRISCH'S)	4TH STREET WALNUT/VINE	85-11415	KASPAR	K-100	DJ
8	SOUTHEAST CORNER	4TH & RACE	85-40572	KASPAR	K-80	DJ
9	SOUTHEAST CORNER	5TH & ELM	85-93831	KASPAR	K-80	DJ
10	NORTHWEST CORNER	6TH & ELM	85-40635	KASPAR	K-80	DJ
11	NORTHWEST CORNER	7TH & ELM	85-40526	KASPAR	K-80	DJ
12	EAST SIDE RACE	(ARCADE) 4TH/5TH	85-93951	KASPAR	K-80	DJ

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#:	LOCATION:	LOCATION:	SERIAL NO:	MANUFACTURER:	MODEL:	OW
13	SOUTHWEST CORNER	5TH & VINE	85-93823	KASPAR	K-80	DJ
14	WEST SIDE WALNUT	(POST OFFICE) 5TH/6TH	85-11411	KASPAR	K-100	DJ
15	SOUTH SIDE 5TH	(WALGREEN) WALNUT / MAIN	85-93868	KASPAR	K-80	DJ
16	NORTHEAST CORNER	5TH & MAIN	85-93815	KASPAR	K-80	DJ
17	NORTHWEST CORNER	5TH & SYCAMORE	85-93827	KASPAR	K-80	DJ
18	SOUTH SIDE 6TH	(PROCTER & GAMBLE) OFF SYCAMORE	85-40636	KASPAR	K-80	DJ
19	NORTH SIDE 6TH	(OLLIE'S TROLLEY) OFF SYCAMORE WE	85-40627	KASPAR	K-80	DJ
20	SOUTHEAST CORNER	6TH & WALNUT	85-36687	KASPAR	K-80	DJ
21	SOUTHEAST CORNER	7TH & VINE	85-40588	KASPAR	K-80	DJ
22	NORTHEAST CORNER	7TH & WALNUT	85-40647	KASPAR	K-80	DJ

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#:	LOCATION:	LOCATION:	SERIAL NO:	MANUFACTURER:	MODEL:	OW:
23	SOUTHEAST CORNER	8TH & MAIN	85-40603	KASPAR	K-80	DJ
24	NORTHEAST CORNER	6TH 7 VINE	85-93853	KASPAR	K-80	DJ
25	NORTHEAST CORNER	6TH & RACE	85-93832	KASPAR	K-80	DJ
26	SOUTHEAST CORNER	7TH & RACE	85-11413	KASPAR	K-100	DJ
28	POST OFFICE	LIBERTY 7 DALTON (NW CORNER)	85-40630	KASPAR	K-80	DJ
29	SOUTHEAST CORNER	8TH & VINE	85-40589	KASPAR	K-80	DJ
30	CITY HALL	PLUM STREET 8TH/9TH	85-40578	KASPAR	K-80	DJ
31	SOUTHEAST CORNER	(FEDERAL BUILDING) 6TH/MAIN	85-11417	KASPAR	K-100	DJ

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#	LOCATION:	LOCATION:	SERIAL NO	MANUFACTURER	MODEL:	OWN	CONDITI
1	SOUTHWEST CORNER	4TH & MAIN	85-35258	KASPAR	TK-49-16	DJ	NEW
2	NORTH SIDE (FRISCH'S)	4TH STREET WALNUT/VINE	85-35253	KASPAR	TK-49-16	DJ	NEW
3	WEST SIDE WALNUT	(POST OFFICE) 5TH/6TH	85-35254	KASPAR	TK-49-16	DJ	NEW
4	SOUTHEAST CORNER	7TH & RACE	85-35257	KASPAR	TK-49-16	DJ	NEW
5	SOUTHEAST CORNER	(FEDERAL BUILDING) 6TH/MAIN	85-35252	KASPAR	TK-49-16	DJ	NEW

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acord CERTIFICATE OF INSURANCE

ISSUE DATE (MM/DD/YY)
March 16, 1987

PRODUCER

MARSH & MCLENNAN
1221 AVE. OF THE AMER.
NEW YORK, N.Y. 10020

INSURED

DOW JONES & CO., INC.
P.O. BOX 300
PRINCETON, N.J. 08540

THIS CERTIFICATE IS ISSUED AS A MATTER OF
INFORMATION ONLY AND CONFERS NO RIGHTS
UPON THE CERTIFICATE HOLDER. THIS CERTIFI-
CATE DOES NOT AMEND, EXTEND OR ALTER THE
COVERAGE AFFORDED BY THE POLICIES BELOW.

COMPANIES AFFORDING COVERAGE

COMPANY LETTER A AMERICAN MOTORIST INS.
CO.

* * *

COVERAGES

THIS IS TO CERTIFY THAT POLICIES OF INSURANCE
LISTED BELOW HAVE BEEN ISSUED TO THE INSURED
NAMED ABOVE FOR THE POLICY PERIOD INDICATED.
NOTWITHSTANDING ANY REQUIREMENT,
TERM OR CONDITION OF ANY CONTRACT OR
OTHER DOCUMENT WITH RESPECT TO WHICH THIS
CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE

INSURANCE AFFORDED BY THE POLICIES
DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS,
EXCLUSIONS, AND CONDITIONS OF SUCH POLICIES.

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	GENERAL LIABILITY	
A	<u>X</u> COMPREHENSIVE FORM	3YM 579 150-00
	<u>X</u> PREMISES/ OPERATIONS UNDERGROUND EXPLOSION & COLLAPSE HAZARD	
	<u>X</u> PRODUCTS COMPLETED OPERATIONS	
	<u>X</u> CONTRACTUAL	
	<u>X</u> INDEPENDENT CONTACTORS	
	<u>X</u> BROAD FORM PROPERTY DAMAGE	
	<u>X</u> PERSONAL INJURY	
POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	
12-31-86	12-31-87	

LIABILITY LIMITS IN THOUSANDS

	EACH OCCURRENCE	AGGREGATE
BODILY INJURY	\$___	\$___
PROPERTY DAMAGE	\$___	\$___
BI & PD COMBINED	\$1000	\$1000
PERSONAL INJURY		\$___

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	AUTOMOBILE LIABILITY	
A	<u>X</u> ANY AUTO	3ZM 579 150-00
	___ (PRIV. PASS.)	
	___ ALL OWNED AUTOS (OTHER THAN PRIV. PASS.)	
	___ HIRED AUTOS	
	___ NON-OWNED AUTOS	
	___ GARAGE LIABILITY	

POLICY EFFECTIVE DATE (MM/DD/YY)		POLICY EXPIRATION DATE (MM/DD/YY)
12-31-86		12-31-87

LIABILITY LIMITS IN THOUSANDS

	EACH OCCURRENCE	AGGREGATE
BODILY INJURY PER PERSON	\$___	\$___
BODILY INJURY PER ACCIDENT	\$___	\$___
PROPERTY DAMAGE	\$___	\$___
BI & PD COMBINED	\$1,000	
BI & PD COMBINED	\$___	\$___

CO LTR	TYPE OF INSURANCE	POLICY NUMBER
	EXCESS LIABILITY	
	___ UMBRELLA FORM	
	___ OTHER THAN UMBRELLA FORM	
A	WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY	3CM 579 150-01
POLICY EFFECTIVE DATE (MM/DD/YY)		POLICY EXPIRATION DATE (MM/DD/YY)
12-31-86		12-31-87

LIABILITY LIMITS IN THOUSANDS

STATUTORY

\$ 500 (EACH ACCIDENT)

\$1,000 (DISEASE-POLICY LIMIT)

\$ 500 (DISEASE-EACH EMPLOYEE)

OTHER

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLE/SPECIAL ITEMS

With respect to vending machines in the City of Cincinnati, Ohio.

CERTIFICATE HOLDER

City of Cincinnati

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE /s/ Illegible

© IIR/ACORD CORPORATION 1984

EXHIBIT 19

Emergency Box Service #861-9191

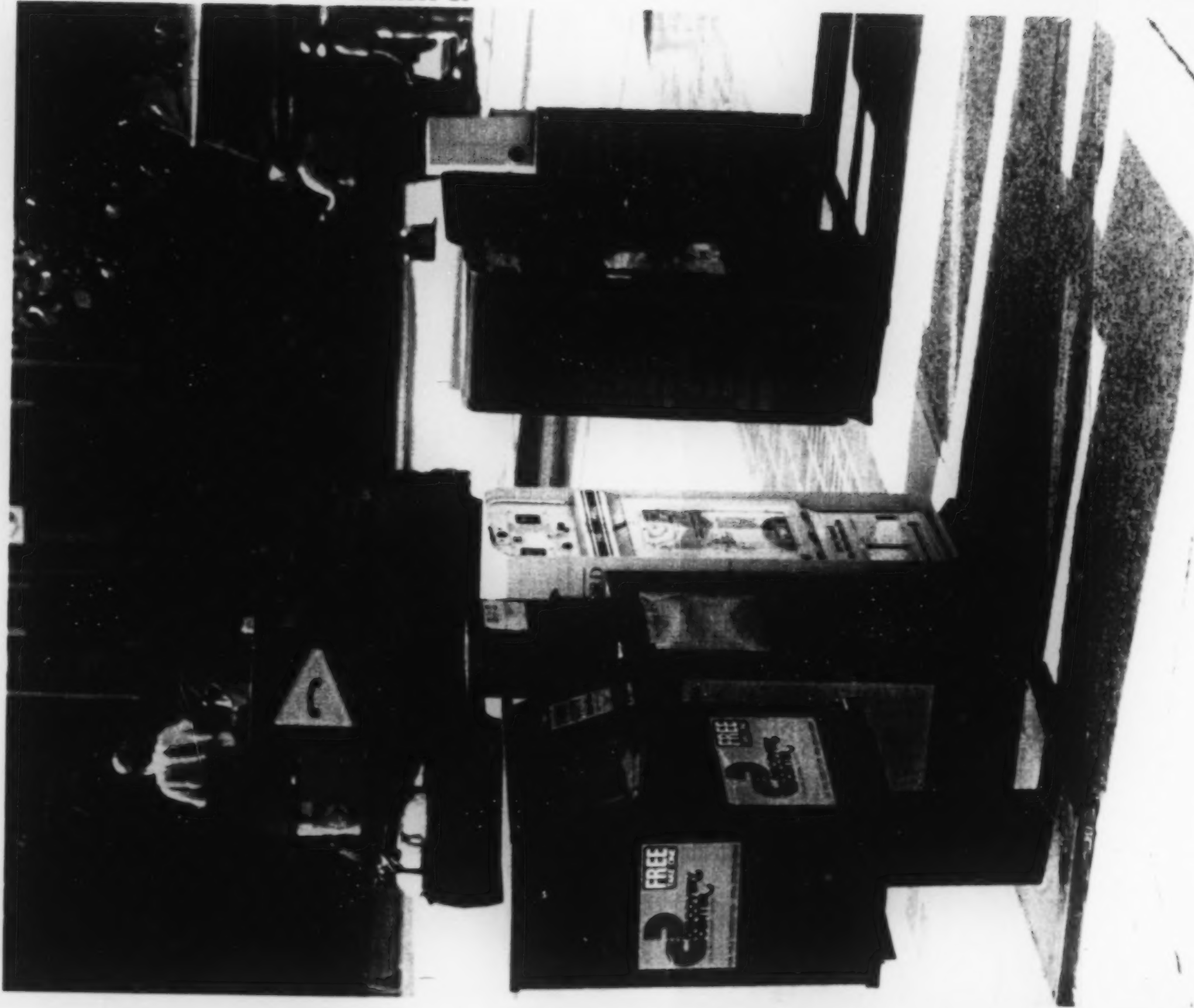
New York Times Vending Box Locations

1. 7th & Walnut
2. 5th & Walnut
3. 4th & Vine (NE corner)
4. Carew Tower (441 Vine)
5. Pioneer Park (Elm between 6th & 7th)
6. Roy Rogers (Skywalk & Race)
7. 4th St. (between Elm & Plum)
8. Netherland Plaza (Race & 5th)
9. Walgreen's (5th Between Walnut & Main)
10. 5th & Main
11. 6th & Main
12. 6th & Walnut
13. 6th St. (between Walnut & Vine)
14. 6th & Vine (NE corner)
15. 7th & Vine
16. 8th & Vine
17. City Hall (8th & Plum)
18. 7th & Plum
19. 7th & Race

20. 8th & Main
21. 9th & Main
22. Holiday Inn (8th & Linn)
23. 6th & Sycamore (NE corner)
24. 6th & Sycamore (P & G entrance)
25. 5th & Sycamore (NW corner)
26. 4th & Sycamore (NE corner)
27. Atrium One (4th & Main SE corner)
28. 4th & Main (SW corner)
29. 4th & Walnut (NE corner)
30. 4th & Walnut (SW corner)
31. Telford & Ludlow
32. Super-X (Ludlow)
33. Steak n Egg (Clifton & Terrace)
34. UC Bus shelter
35. Calhoun & W. Clifton
36. Corryville Post Office
37. Perkins (2600 Vine)
38. VernonManor (400 Oak)
39. UC Medical School (Bethesda Av.)
40. St. Gregory & Pavilion
41. Frisch's (1026 E. McMillan)

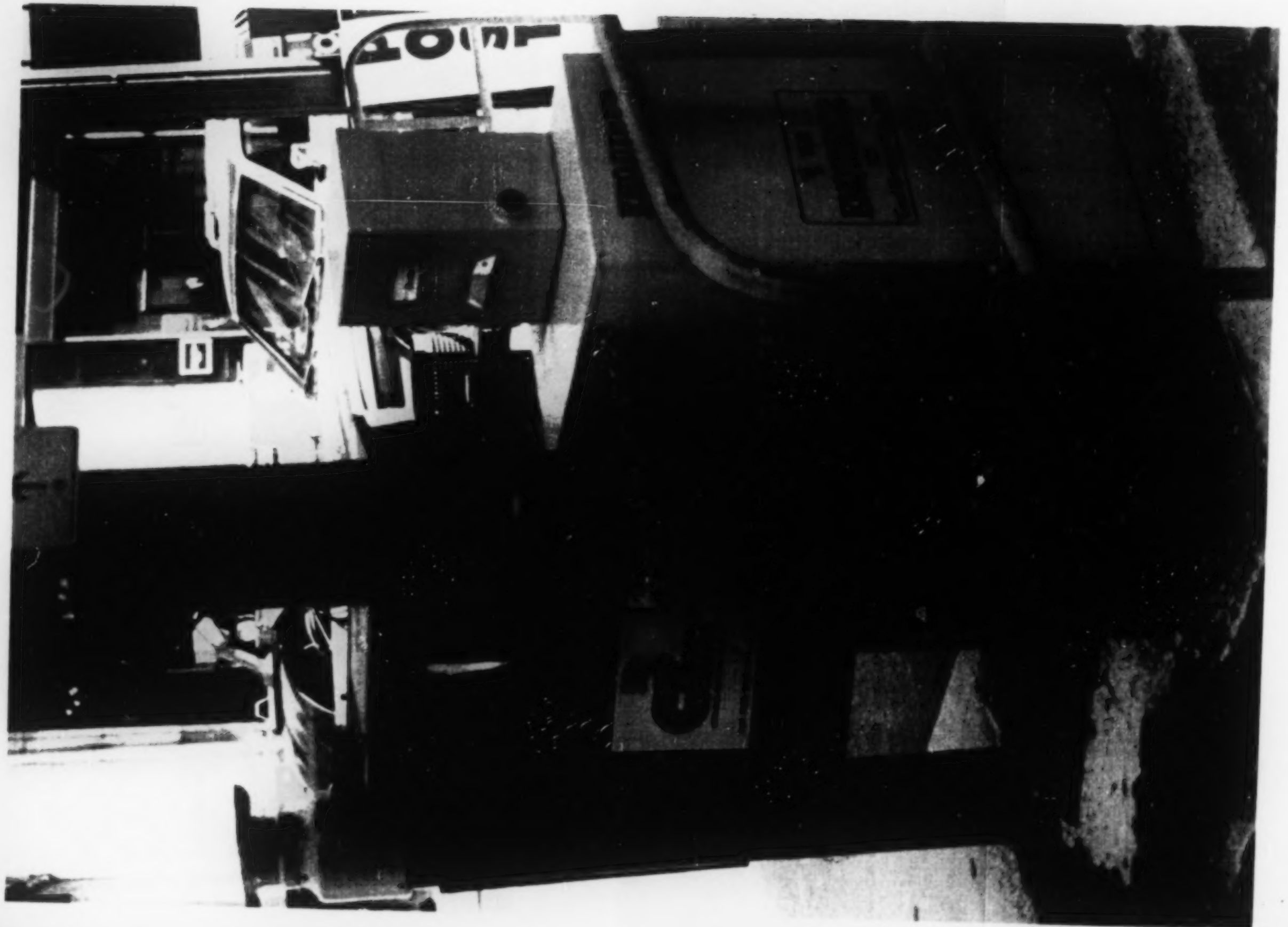
42. Hickory farms (Hyde Park Square)
 43. Miller Gallery (Hyde Park Square)
 44. Mt. Washington Bakery
 45. Kroger (North Bend near Hamilton)
 46. Roselawn Post Office (1730 Section)
 47. Busken Bakery (7760 Reading)
 48. Xavier University (Ledgewood Av.)
-

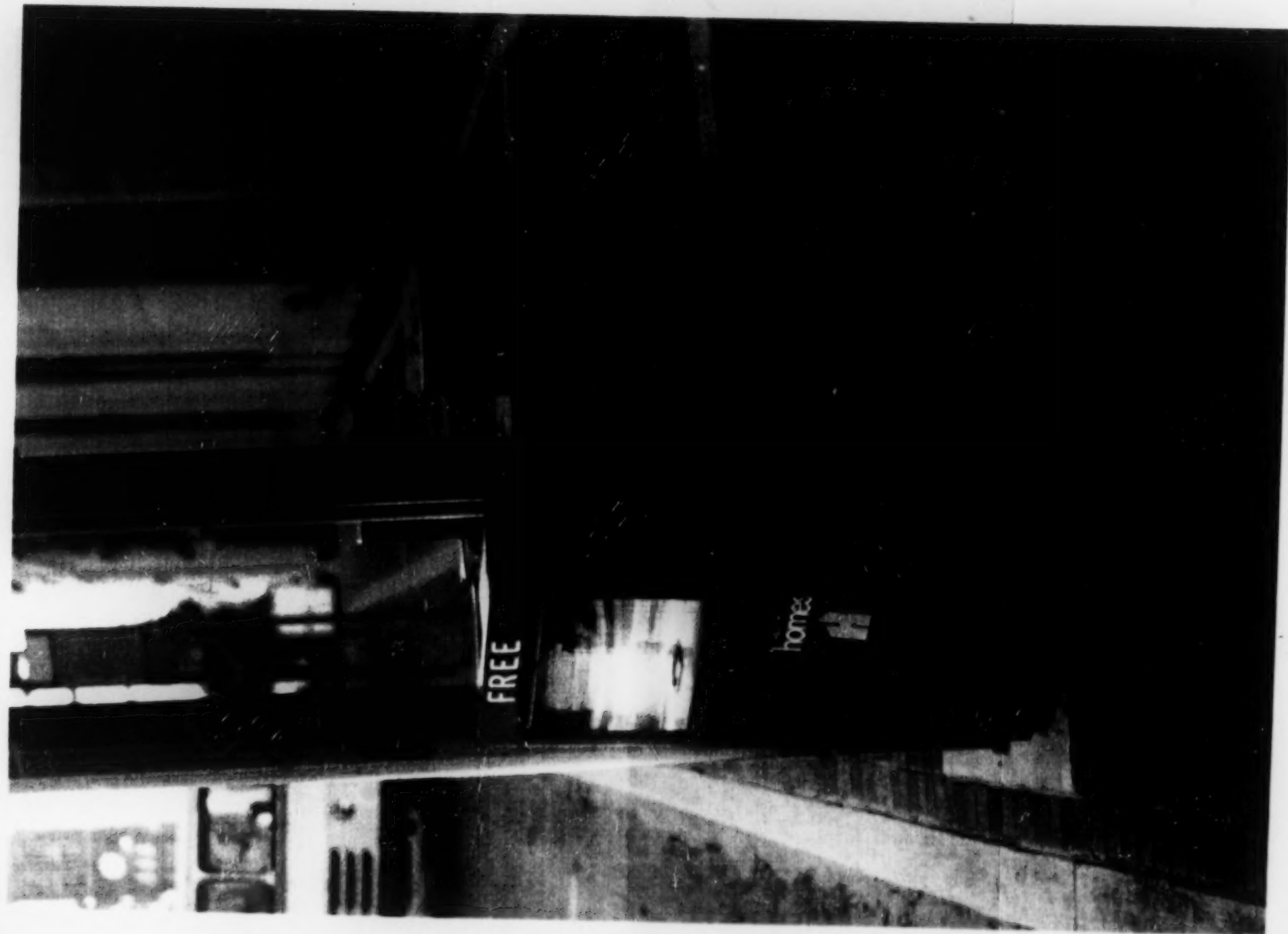
EXHIBIT 20



EXHIBIT

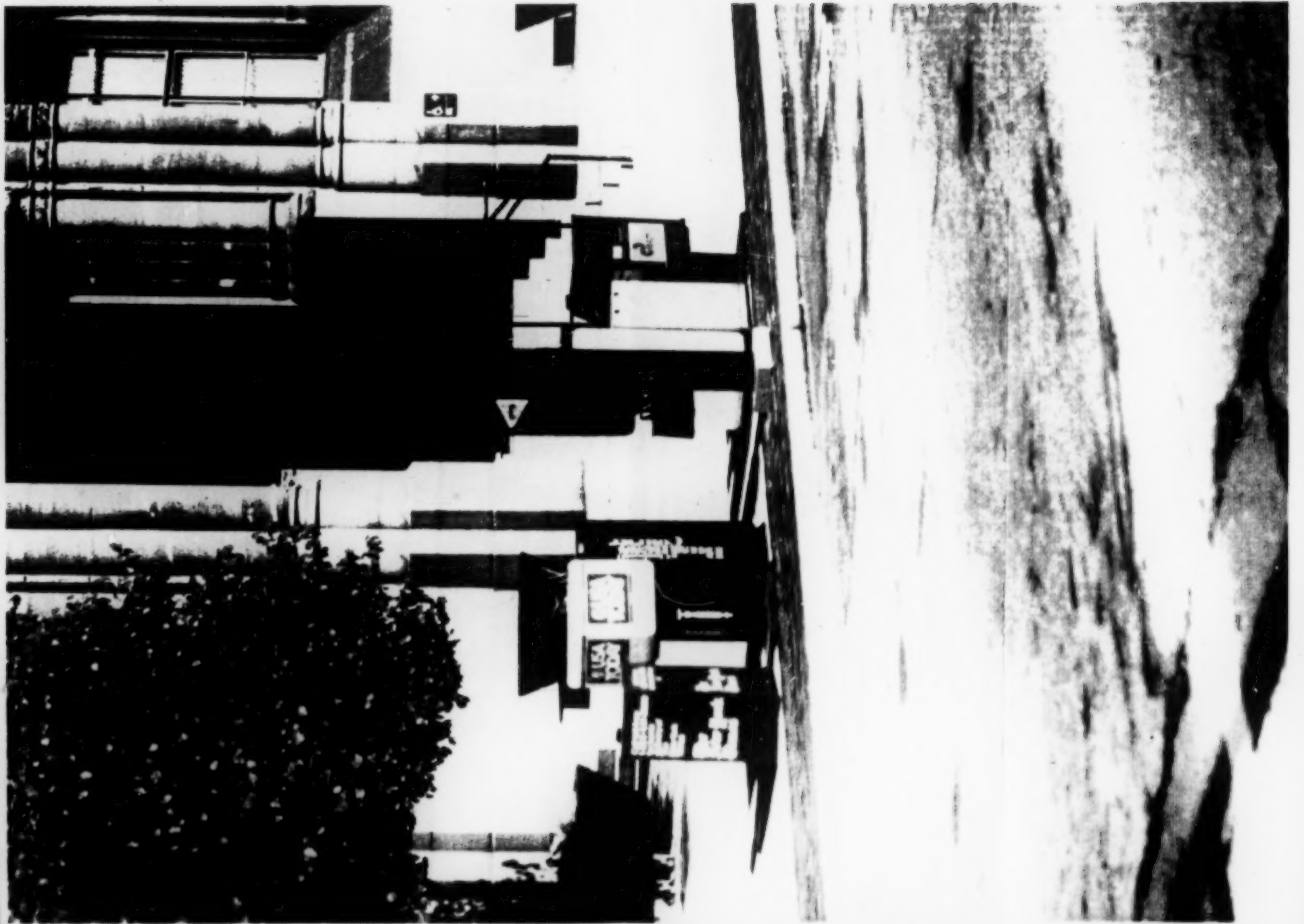
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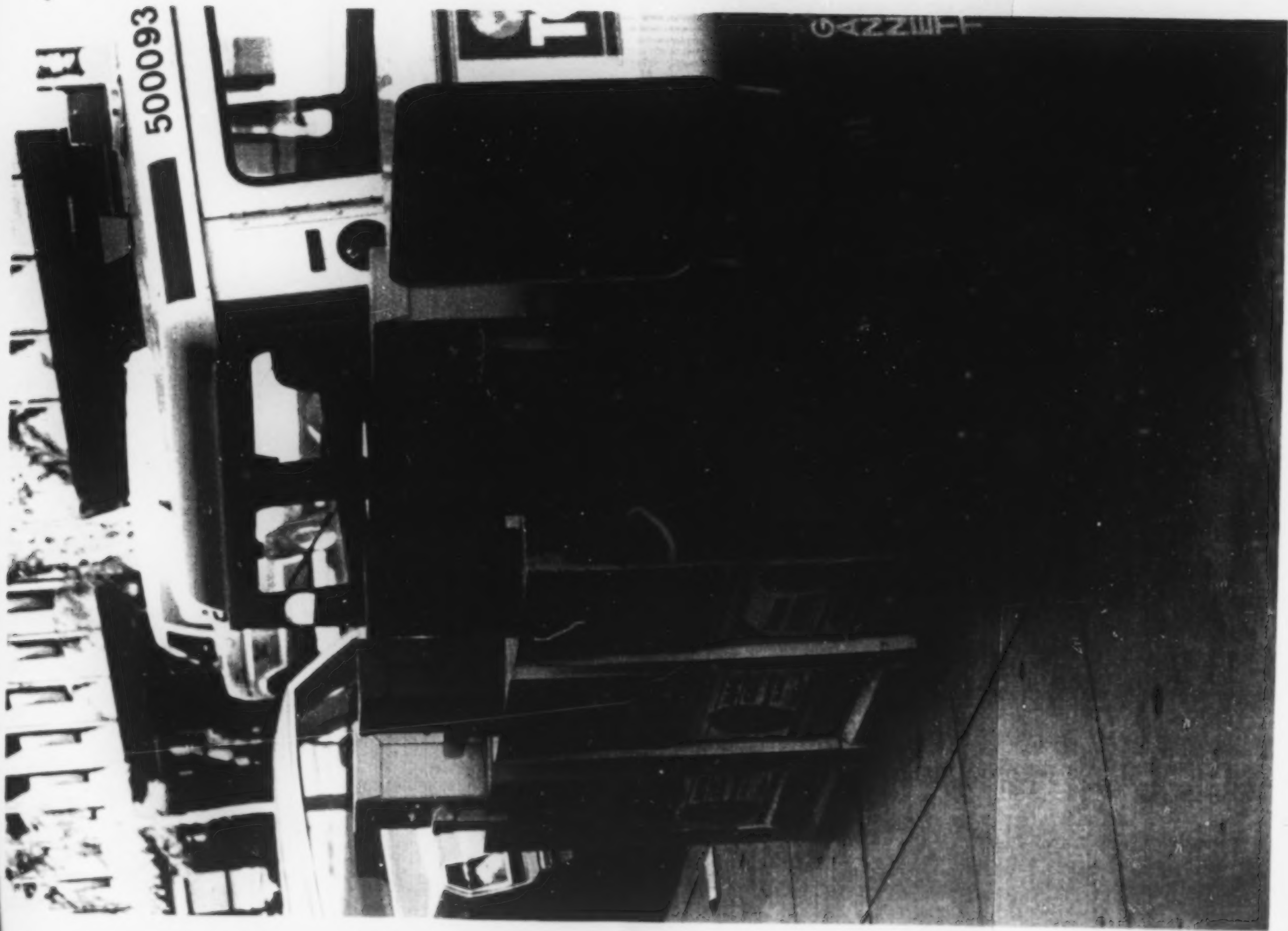






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No. 91-1200

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Cincinnati's regulatory scheme prohibiting the placement of newsrack-type advertising dispensers upon city sidewalks burdens more speech than is necessary to achieve the City's admittedly substantial interests in the safety and esthetics of its public right-of-way.
2. Whether the Court of Appeals erred in holding that Cincinnati's regulatory scheme prohibiting the placement of newsrack-type advertising dispensers on its public rights-of-way, as applied to Discovery and Harmon is not a reasonable time, place and manner restriction.

LIST OF PARTIES

The petitioner, City of Cincinnati (hereinafter "Cincinnati") is a municipal corporation in the State of Ohio. Respondents, Discovery Network, Inc. (hereinafter "Discovery") and Harmon Publishing Company (hereinafter "Harmon") both conduct business in the Cincinnati, Ohio area.

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OPINIONS BELOW

The opinion of the Sixth Circuit is printed in the appendix to petitioner's writ of certiorari at pages 1a-10a. It is also printed in the joint appendix at page 37 and is reported at 946 F.2d 464 (6th Cir. 1991). The findings of fact and conclusions of law of the United States District Court for the Southern District of Ohio is printed in the joint appendix at page 25.

 JURISDICTION

Respondents Discovery and Harmon brought this action pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief and alleging that petitioner Cincinnati's statutory scheme prohibiting the distribution of commercial handbills violated plaintiffs' First Amendment right to freedom of speech. (J.A. 3.) Respondents also alleged that the appeal process utilized by Cincinnati in enforcing its statutory scheme violated Fourteenth Amendment due process guarantees. (J.A. 3.) After a trial to the court, the due process claim was resolved in favor of Cincinnati. However, the First Amendment claim was resolved in favor of respondents. (J.A. 35.) Cincinnati filed a notice of appeal on September 10, 1990. (J.A. 36.) The opinion and judgment of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the trial court, were issued on October 11, 1991. (J.A. 37.)

The petition for writ of certiorari was filed on January 9, 1992 and the Court granted the petition on March 9, 1992.

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Also involved are Sections 714-1-C, 714-1-N, 714-23, 862-1, and 911-17 of the Cincinnati Municipal Code (hereinafter C.M.C.). The complete text of those sections along with the text of the Administrative Regulations, including Amended Regulation 38, which interprets them is set forth in the appendix to this brief.

STATEMENT OF THE CASE

Discovery is an Ohio corporation that provides non-credit educational, recreational and social programs to interested persons in Cincinnati for various fees. (J.A. 26-27.) In order to sell its programs Discovery publishes an advertising brochure nine (9) times per year. (*Id.*) Approximately one-third (1/3), or thirty-three percent (33%) of these brochures are given away to pedestrians through metal newsrack-type dispensing devices placed on the sidewalk in thirty-eight (38) locations in Cincinnati. (*Id.* at 27.)

Harmon is a New Jersey corporation registered and doing business in Ohio as a foreign corporation, that publishes and distributes free advertising brochures which advertise real estate for sale in various locations. (*Id.* at 26-27.) Approximately fifteen (15%) percent of these brochures are distributed to pedestrians through the use of red plastic newsrack-type dispensers in twenty-four (24) locations on the public sidewalks of Cincinnati. (*Id.* at 27.)

"Home Magazine," as Harmon's brochures are titled, consists primarily of listings and photographs of residential properties available in the Greater Cincinnati area, but occasionally includes information about market trends and other real estate matters. (*Id.* at 166-167.) Discovery's brochure contains information about the courses and programs offered by Discovery and is intended to directly promote registration in those courses and programs. Both publications are merely advertisements focused upon attracting customers. Neither brochure is a "newspaper." (*Id.* at 28, 29, 139, 166.)

Pursuant to C.M.C. Section 714-23, Cincinnati prohibits the distribution of all publications that constitute "commercial handbills," as defined in C.M.C. Section 714-1-C, on public property. (*Id.* at 27.) C.M.C. Sections 714-1-N, 911-17 and 862-1, however, specifically authorize the distribution of newspapers in the public rights-of-way through the use of newsrack-type dispensers and other means. (*Id.* at 28.)

On or about March 8, 1990, Cincinnati, through its Director of Public Works, notified both Harmon and Discovery that their publications constituted commercial handbills and ordered respondents to remove their dispensing devices from the public right-of-way. (*Id.* at 29.) Discovery and Harmon appealed the decision of the Director of Public Works to a three-member appeals committee but the decision of the Director of Public Works was upheld. (*Id.* at 30.) Thereafter, on June 1, 1990, respondents filed suit in the United States District Court for the Southern District of Ohio, Western Division, pursuant to 42 U.S.C. §1983 claiming that Cincinnati's regulatory scheme violated their First and Fourteenth

Amendment rights of free speech and due process and seeking declaratory and injunctive relief as well as attorneys' fees. (*Id.* at 3.)

At trial, Mr. Robert Richardson, principal city architect, testified on behalf of Cincinnati. (*Id.* at 62.) Mr. Richardson stated that his duties include the design and upkeep of the "streetscape" which consists of the public right-of-way and sidewalk area (*Id.* at 178-179.) and encompasses the sidewalk paving, lighting systems, landscaping or trees, plus any street furniture or hardware along the City right-of-way. (*Id.* at 179.) In designing a streetscape system, esthetics are an important consideration. (*Id.* at 180.) In fact, one major purpose for designing streetscapes is to improve the appearance of the area in order to impress visiting business people and tourists. (*Id.*) Another is to support private development. (*Id.* at 180-181.) Since Cincinnati is in competition with other cities to attract development and retain business, keeping the public portions of the streets esthetically pleasing is important to the City's continued vitality. (*Id.* at 181.)

Newsrack-type dispensing devices, such as those utilized by Discovery and Harmon, detract from the effectiveness of the streetscaping plans. (*Id.*) Streetscapes are designs starting with the lighting systems and determining the amount of light needed in relation to building foundations. (*Id.*) Traffic signals are likewise an important consideration. (*Id.*) Parking signs, parking meters, trash receptacles, and transformer boxes, are all incorporated into the streetscape. (*Id.* at 181-182.) However, newsrack-type dispensing devices are not designed into the system. (*Id.* at 182.) The devices are often randomly placed, where

they interfere with crosswalks and handicap ramps, and are frequently attached to light poles with bare chains which cause the poles to rust. (*Id.*) In Mr. Richardson's opinion, therefore, dispensing devices such as those utilized by Harmon and Discovery detract from the esthetics of the streetscape. (*Id.* at 183.)

Mr. Thomas Young, City Engineer, testified that in his opinion, the type of dispensing device utilized by respondents may detract from the safety of the right-of-way in several respects. (*Id.* at 193-194.) They may be placed within, or too close to, crosswalks so that they may hinder pedestrian traffic. (*Id.* at 194.) They may also obstruct handicap ramps. (*Id.*) They obstruct the visibility of motorists and pedestrians, particularly small children who are pedestrians. (*Id.*) They may also be placed so that they generally restrict the use of the sidewalk. (*Id.*)

The United States District Court for the Southern District of Ohio (Spiegel, J.) held that the application of Cincinnati's statutory scheme violated Harmon's and Discovery's First Amendment rights of free speech and consequently violated 42 U.S.C. Section 1983. (*Id.* at 35.) The District Court ruled in the City's favor on the due process claim. (*Id.*)

The District Court found that respondents advertising brochures constitute commercial speech since both

publications propose commercial transactions and are primarily advertisements. (*Id.* at 31.) Neither publication contains noncommercial speech that is inextricably intertwined with commercial speech. (*Id.*) Therefore, the test advanced by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) controlled. (*Id.*)

The Court found that Cincinnati may regulate newsrack-type dispensing devices pursuant to its substantial government interest in promoting safety and esthetics on or about the public right-of-way under *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). (*Id.*) However, the District Court found that prohibiting Discovery and Harmon from affixing their newsrack-type dispensers to the public right-of-way is an "excessive means" by which to accomplish Cincinnati's objectives of safety and esthetic appeal. (*Id.* at 32.) Noting that the number of newsrack-type dispensers on Cincinnati's public rights-of-way containing purely advertising material was small in comparison to the number of newspaper dispensing devices, the Court stated that newsrack-type dispensers containing purely advertising material affected public safety and esthetics in "only a minimal way." (*Id.*) The District Court also noted that other communities chose to deal with safety and esthetics problems by regulating the size, shape and color of various dispensing devices. The District Court held that Cincinnati's statutory scheme did not reasonably fit the governmental objectives of safety and esthetics sought to be promoted, as required by *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). (*Id.* at 32.) The parties had previously stipulated that plaintiff's advertising brochures concerned lawful activities and were not misleading. (*Id.* at 31.)

The Sixth Circuit Court of Appeals affirmed the decision of the District Court. (*Id.* at 58.) The Court, in fact, went beyond the holding of the District Court and held that commercial speech may be regulated differently than non-commercial speech only when the regulations deal with the content of the speech itself, or with distinctive effects produced by the content of the speech. (*Id.* at 51-52.) The Court noted that *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) held that a San Diego ordinance similar in effect to Cincinnati's ordinance was a permissible regulation of commercial speech, but since *Metromedia* was a plurality opinion on that issue, the Sixth Circuit Court did not consider the case binding on that point. (*Id.* at 49 n.9.)

The Court stated that all commercial speech regulations previously upheld the regulation sought to ban speech which was itself believed to be inherently false or misleading, or the regulation sought to alleviate adverse effects allegedly caused by and directly flowing from the type of speech regulated. (*Id.* at 49-50.) Since Cincinnati's statutory scheme was not directed toward either of these objectives, the scheme did not "reasonably fit" the governmental objective sought to be advanced absent some content based justification. (*Id.* at 53.) However, the Sixth Circuit held that Cincinnati would have to treat both commercial and noncommercial publications similarly. (*Id.* at 53-54.) No preference for noncommercial speech due solely to its noncommercial nature is permitted by the Sixth Circuit Court's decision. Rather, commercial and noncommercial publications must be afforded equal First Amendment protection absent a content based restriction. (*Id.*)

Further, the Court held that Cincinnati's statutory scheme did not qualify as a reasonable time, place or manner restriction, since it was not "content neutral." (*Id.* at 54.) In so holding the Court noted that Cincinnati could not treat newsrack-type dispensing devices distributing advertisements differently from those devices distributing commentary on public affairs. (*Id.* at 56.) The Court also stated that even if the statutory schemes were "content neutral" the scheme would fail because it was not "narrowly tailored to serve a significant governmental interest." The Court of Appeals interpreted the "narrowly tailored" requirement as a "least restrictive means" standard. (*Id.* at 57.)

The decision of the Court of Appeals was filed on October 11, 1991. The petition for writ of certiorari was filed on January 9, 1992 and was granted by this Court on March 9, 1992.

SUMMARY OF ARGUMENT

Cincinnati's statutory scheme, which prohibits Discovery and Harmon from affixing newsrack-type advertising dispensers to city sidewalks, satisfies the four elements required under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557, 566 (1980). Under *Central Hudson* a governmental regulation on commercial speech will be upheld if: 1) it regulates commercial speech; 2) it promotes a substantial governmental interest; 3) it directly advances that interest; and 4) it burdens no more speech than is necessary to promote the substantial governmental goal. *Id.*

The Court of Appeals held that Cincinnati's regulatory scheme, as applied to Discovery and Harmon, did not satisfy the fourth prong of the test. The Court reasoned that since alternative methods of regulation existed, which may have been less burdensome upon Discovery's and Harmon's advertising brochures, that the scheme burdened more speech than necessary to promote Cincinnati's substantial interest in the safety and esthetics of its rights-of-way. The Court of Appeals further held that Cincinnati could not prohibit distribution of Discovery's and Harmon's advertising brochures through newsrack-type dispensers unless Cincinnati could show that either: 1) the speech involved was inherently false or misleading; or 2) there existed distinctive adverse effects caused by and directly flowing from the type of commercial speech regulated.

The Court of Appeals erred on all of these points. The validity of commercial speech regulation does not depend upon a lack of less restrictive alternatives. *Bd. of Trustees State University of New York v. Fox*, 492 U.S. 469 (1989) holds that the application of the *Central Hudson* test is similar to the application of the test for time, place and manner restrictions. Time, place and manner regulations are not required to be the least restrictive means usable. As long as the regulation is not substantially more burdensome than necessary to further the governmental goal, the regulation will be upheld. The focus is upon the burden upon speech and the governmental purpose as a whole. The degree to which such purpose is furthered in a particular case is irrelevant. Further, local lawmakers are to be accorded some deference in deciding upon the appropriate regulatory means to further their particular

goals. In this case, Cincinnati has burdened *less* speech than necessary to totally accomplish its goals, since sidewalks will remain visually and physically cluttered by newsrack-type dispensers dispensing noncommercial forms of speech such as newspapers. The content based factors suggested by the Court of Appeals are inapplicable to a *Central Hudson* analysis since *Central Hudson* assumes truthful speech that is not misleading. Furthermore, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) should be considered binding in the Sixth Circuit, as it relates to commercial speech, based both upon its reasoning and upon the number (7) of justices concurring in that portion of the opinion.

Additionally, the Court of Appeals erred in holding that Cincinnati's regulatory scheme was not a reasonable time, place and manner restriction. Reasonable time, place and manner restrictions are permissible provided the restrictions are justified without regard to the content of commercial speech, they are narrowly tailored to serve that interest and they leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

In determining content neutrality in time, place, and manner cases the principal inquiry is whether the government has adopted a regulation of speech because of a disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral. Cincinnati's scheme prohibiting the placement of newsrack-type dispensers containing advertising brochures on city sidewalks seeks only to promote the safety and esthetic appearance of

Cincinnati public ways and is therefore content neutral. Cincinnati does not disagree with any message conveyed by Discovery's or Harmon's advertising brochures.

As was noted, Cincinnati's regulatory scheme, as applied to Discovery and Harmon, is narrowly tailored to serve Cincinnati's interests in the safety and esthetics of its public ways. It burdens no more speech than is necessary to promote those goals. In fact, it has stopped short of fully accomplishing its goals, for it permits newsrack-type dispensers containing newspapers.

Finally, ample alternative channels of communication are open to Discovery and Harmon. Harmon distributes only fifteen percent (15%) of its brochures through newsrack-type dispensers. Discovery distributes one-third (1/3), or thirty-three percent (33%) of its brochures in this manner. Therefore, alternative modes of communication are both open and are being utilized by both Discovery and Harmon. Cincinnati's regulatory scheme as applied to Discovery's and Harmon's affixing newsrack-type dispensers to city rights-of-way is a reasonable time, place and manner regulation.

ARGUMENT

I. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS UPON CITY SIDEWALKS BURDENS NO MORE SPEECH THAN IS NECESSARY TO FURTHER THE CITY'S SUBSTANTIAL GOVERNMENTAL INTEREST IN THE SAFETY AND ESTHETICS OF ITS PUBLIC RIGHT-OF-WAY.

A. Cincinnati's regulatory scheme does not burden substantially more speech than is necessary to further its interest in the safety and esthetics of its public right-of-way.

In determining whether Cincinnati's regulatory scheme was constitutional as applied to the exclusion of Discovery's and Harmon's newsrack-type advertising dispensers from city sidewalks, the Court of Appeals correctly utilized this Court's test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). That test provides that a government regulation will be upheld if the regulation: (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and (4) is not more extensive than is necessary to accomplish this substantial governmental objective. *Id.* (J.A. 44)

The Court of Appeals also correctly noted that Cincinnati's regulatory scheme satisfied the first three prongs of the *Central Hudson* test: 1) the scheme regulates purely commercial speech¹; 2) Cincinnati's interest in

¹ The Court of Appeals incorrectly implies, however, that the City of Cincinnati's regulatory scheme may be applied to

(Continued on following page)

providing a safe and esthetic right-of-way is substantial; 3) Cincinnati's regulatory scheme directly promotes and advances its substantial governmental interest in providing a safe and esthetic right-of-way. (*Id.*)

This Court has repeatedly stated that governmental restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its substantial interests. See *e.g.* *Central Hudson*, 447 U.S. at 556; *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-508 (1981) (plurality opinion); *In re: R.M.J.*, 445 U.S. 191, 203 (1982); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 694 (1985); *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 343 (1986); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 535 (1987); *Shapiro v. Kentucky Bar Assoc.*, 486 U.S. 466, 472 (1988). If the word "necessary" is interpreted strictly, these statements would translate into a "least restrictive means" test. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476 (1989). However, as this Court stated in *Fox*, the

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prohibit newspapers from distributing within the public right-of-way. Section 862-1 of the Cincinnati Municipal Code states in pertinent part: "Permission is hereby granted to any person or persons lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of city streets for selling newspapers . . .". Furthermore, Section 911-17 of the Cincinnati Municipal Code states in part: "newspapers of general circulation in the City of Cincinnati may be sold from racks, containers and bags attached to poles and other structures on city sidewalks in accordance with rules and regulations promulgated by the city manager relating to the safety and unobstructed use of the streets by vehicular and pedestrian traffic." The concern of the Court of Appeals, then, is clearly unfounded.

fourth prong of the *Central Hudson* test requires something short of a least restrictive means standard. *Id.* at 477.

Commercial speech enjoys a limited measure of First Amendment protection, commensurate with its subordinate position in the scale of First Amendment values and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression. *Id.* at 477. (citing *Ohrlik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). The ample scope of regulatory authority suggested by this statement would be illusory if it were subject to a least restrictive means requirement, which imposes a heavy burden upon the State. *Id.*, (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).)

Least restrictive means requirements have not been imposed – even where core political speech is at issue – in assessing the validity of time, place and manner restrictions.² *Fox*, 492 U.S. at 477-478. Such restrictions are upheld so long as they are "narrowly tailored" to serve a significant governmental interest, a standard that has not been interpreted to require elimination of all less restrictive alternatives. *Id.* at 478. This is also true with respect

² The "time, place and manner" analysis, however, would appear to impose more of a burden upon the government. This makes sense, since time, place and manner restrictions may burden noncommercial speech as well as purely commercial speech. For example, time, place and manner regulations must be "content neutral." While Cincinnati's statutory scheme in the present case happens to be content neutral, there is no requirement of content neutrality in the *Central Hudson* test. As the Court of Appeals later noted, some commercial speech regulations upheld by this Court have indeed been content based.

to Government regulation of expressive conduct, including conduct expressive of political views. In requiring a regulation to be "narrowly tailored" to serve an important or substantial state interest, the First Amendment does not require that there be no conceivable alternative, but only that the regulation burden not "substantially more speech than is necessary to further the government's legitimate interest." *Fox*, 492 U.S. at 478. (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The Court has been loath to second-guess the Government's judgment to that effect. *Id.*, (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. at 299; *United States v. Albertini*, 472 U.S. 675, 689 (1985)). In *San Francisco Arts & Athletics, Inc. v. United States Olympics Committee*, 483 U.S. 522, 537 at n. 16 (1987), this Court stated that the application of the *Central Hudson* test was "substantially similar" to the application of the test for validity of time, place and manner restrictions upon protected speech - which has been specifically held not to require least restrictive means. (See, also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

No case invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest at stake. *Fox*, 492 U.S. at 479. To the contrary, almost all restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive disregarding "far less restrictive and more precise means". *Id.*, (citing *Shapiro v. Kentucky Bar Assn.*, 486 U.S. at 476; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

On the other hand, decisions *upholding* the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. Rather, this Court stated that it was up to the legislature to decide that point so long as its judgment was reasonable. *Id.* In *Posadas*, for example, where Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents was upheld, this Court noted that the governmental goal of deterring casino gambling may have been adequately served "not by suppressing commercial speech that might encourage such gambling, but by promulgating additional speech designed to discourage it." 478 U.S., at 344. Similarly, in *Metromedia, Inc. v. San Diego*, 453 U.S. at 513 (plurality opinion) this Court upheld San Diego's complete ban of off-site billboard advertising without inquiring whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the City's concerns for traffic safety and esthetics. *Metromedia*, 453 U.S. at 508. The Court noted:

"Similarly, we reject appellants' claim that the ordinance is broader than necessary and therefore fails the fourth part of the *Central Hudson* test. If the City has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The City has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows on-site advertising and some other specifically exempted signs." *Id.* (See, also *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991); *Don's*

Porta Signs, Inc. v. City of Clearwater, 874 F.2d 1051, 1054.)

Similarly, if Cincinnati has a sufficient basis for believing that Discovery's and Harmon's newsrack-type advertising dispensers interfere with pedestrian and vehicular traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. Like the City of San Diego, Cincinnati has gone no further than necessary in seeking to meet its ends. In fact, it has stopped short of fully accomplishing its ends. It has not prohibited all newsrack-type dispensing devices, but specifically allows newsracks containing newspapers and other noncommercial forms of speech. The safety and esthetics of Cincinnati's public ways will continue to be adversely affected by the presence of newsrack-type dispensers containing noncommercial publications. Therefore, Cincinnati has actually burdened less speech than would be necessary to fully accomplish its governmental objective.

The Court of Appeals improperly focused on the admittedly incomplete effect of the regulatory scheme as applied. The Court stated:

"If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances³, then Cincinnati's ordinance cannot be

³ The two specific circumstances were part of a "test" announced by the Court of Appeals requiring governmental regulations burdening commercial speech to: 1) deal with the content of the speech itself (that speech which is believed to be

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a "reasonable fit". Plaintiffs will bear a heavy burden by being completely deprived⁴ of access

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inherently false or misleading); 2) seek to alleviate *distinctive adverse effects* allegedly caused by and directly flowing from the speech itself. (J.A. 49-50.) This "test" is not to be found anywhere in any previous decision of this court. Since this Court's decision in *Central Hudson*, it has been clear that the government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. *Central Hudson*, 447 U.S., at 563, 564. There is no requirement that government adhere to other strictures contained within the *Central Hudson* analysis for regulating those types of speech. The *Central Hudson* requirements only apply when the commercial speech regulated is neither misleading nor related to unlawful activity. The Court of Appeals correctly notices this (J.A. 47) then apparently ignores itself. The "test" proposed by the Court of Appeals, then, would apply the *Central Hudson* test only when the speech itself is misleading or relates to conduct that is illegal or less "distinctive" adverse effects. Simply put, that is not the *Central Hudson* test.

Furthermore, in advancing its test the Court of Appeals correctly noted that *Metromedia* required no such content based determinations, but held that since *Metromedia* was a plurality opinion, it was not binding precedent (J.A. 9.) However, seven (7) out of nine (9) justices of this Court agreed that San Diego's ordinance prohibiting offsite billboard advertising was permissible as applied to commercial speech. *Metromedia* (Justice White, Justice Stewart, Justice Marshall, and Justice Powell, in the plurality opinion) (Chief Justice Burger, dissenting) (Justice Stevens, dissenting in part) (Justice Rehnquist, dissenting in part).

⁴ Plaintiffs are not "completely deprived of access" to city streets, rather, they simply may not appropriate city sidewalks on a semi-permanent basis. Discovery and Harmon are free to

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to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance; Harmon 15%. The *benefit* gained by the city, on the other hand, is miniscule (sic). Plaintiffs own only 52 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden on it by Cincinnati's ordinance cannot be justified by the *paltry gains* in safety and beauty achieved by the ordinance." (J.A. 53)

Apparently, then, the Court of Appeals focused upon the "paltry" or "miniscule" effects of banning Discovery's and Harmon's advertising dispensers from Cincinnati sidewalks. However, that is not the proper focus of the fourth prong of the *Central Hudson* test. The regulation must ban no more speech than is necessary to further the substantial governmental interest to pass muster under *Central Hudson*. There is no requirement that the interest be furthered a particular degree or a certain amount (i.e. something above "paltry" or "miniscule"). Rather, the focus is upon the relation the regulation bears to the

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communicate with others on the sidewalk in numerous other methods, i.e., verbal communication. The First Amendment does not guarantee the right to employ every conceivable method of communication at all times in all places. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S., at 647. The Court of Appeals itself notes that Discovery distributes two thirds (2/3) or sixty six percent (66%) of its advertising magazines through other sources. Likewise, Harmon distributes eighty-five percent (85%) of its magazines through other means. (J.A. 53.) Clearly, then, alternative modes of communication are available.

overall problem the government seeks to correct, not on the extent it furthers the government's interest in a particular case. In the present case, Cincinnati's regulatory scheme, as applied to Discovery's and Harmon's advertising dispensers, does not burden more speech than is necessary to further the City's interest in the safety and esthetics of its public sidewalks.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) the Court noted:

"The validity of (time, place or manner) regulations⁵ does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the *degree* to which those interests should be promoted." 491 U.S., at 800 (citations omitted.)

"Government may not regulate expression in such a manner that a *substantial portion* of the burden on speech does not serve to advance its goals." *Id.* at 799.

"[T]he validity of the regulation depends on the relation it bears to the *overall problem* the government seeks to correct, not on the *extent* to which it furthers the government's interest in a particular case." *Id.* at 801.

In the present case, all of the speech incidentally burdened by the regulatory scheme furthers Cincinnati's substantial governmental interest in providing a safe and

⁵ In *Fox* this Court held that the application of the *Central Hudson* test is substantially similar to the application of the test for validity of time, place and manner restrictions upon commercial speech. *Fox*, 492 U.S. at 477.

esthetically pleasing public sidewalk. The fact that Cincinnati is not completely achieving its goal by prohibiting only those dispensers containing advertising materials is irrelevant.⁶ *Central Hudson* requires no "balancing test" of speech burdened against interest served. All of the speech regulated by Cincinnati's refusal to allow Discovery and Harmon to affix newsrack-type advertising dispensers to Cincinnati sidewalks⁷ furthers the City's

⁶ In *Metromedia* this Court stated:

"In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that this ordinance is underinclusive because it permits on-site advertising. Second, the city may believe that off-site advertising with its periodically changing content presents a more acute problem than does on-site advertising. (Citations omitted.) Third, San Diego has obviously chosen to value one kind of commercial speech, on site advertising – more than another kind of commercial speech, off-site advertising. The ordinance reflects a decision by the City that the former interest, but not the latter, is stronger than the City's interests in traffic safety and esthetics . . . it does not follow from the fact that the City has concluded that some commercial interests in this context that it must give similar weight to all other commercial advertising." 453 U.S. 490, at 512.

Nor must Cincinnati treat all newsrack-type dispensers equally.

⁷ With regard to affixing objects, such as newsrack-type dispensers to the public right-of-way, this Court noted in

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interest in the safety and esthetics of its public way. Cincinnati is merely refusing to allow Discovery or Harmon to appropriate public property, on a semi-permanent basis, in order to advertise their services to the exclusion of the use of the general populace. In fact, it burdens no speech outside the public way. Both Discovery and Harmon are free to sell their wares through the mail and upon the property of consenting private landowners, including bookstores and newsstands. Indeed the record reflects that most of Harmon's (85%) and Discovery's (66%) advertising brochures are distributed outside of newsrack-type dispensers. Consequently, Cincinnati's refusal to allow Discovery and Harmon to place newsrack-type dispensers in the public right-of-way burdens no more speech than is necessary to further its substantial governmental interests.

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Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) (White, J. dissenting):

"The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting . . . This use is common to all members of the public, and it is a use open equally to all citizens . . . But the use made by the telegraph company is, in respect to so much of the space it occupies with its poles, is permanent and exclusive . . . Whatsoever benefit the public may received in the way of messages, that space is, so far as respects its actual use for the purpose of highway and personal, wholly lost to the public." *Id.* at 779-780. (Citing *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1983)).

Regarding the hypothetically less restrictive methods by which Cincinnati may further its substantial interests in providing a safe and esthetic right-of-way, the Court of Appeals stated:

"In contrast to Cincinnati's fears, it has many options to it to control the perceived ill effects of newsracks, apart from banning those dispensing commercial speech. To the extent that the use of chains to fasten the newsracks is unsafe, a regulation requiring that all newsracks be bolted to the sidewalk would solve the problem. To the extent that esthetics are a concern, a regulation establishing color and design limitations upon all newsracks would fit the bill. In fact, counsel for Cincinnati admitted at oral argument that it is currently working on an ordinance of this sort with representatives of traditional newspapers. To the extent that the number of newsracks is disturbing, the city can establish a maximum number of newsracks permitted on city sidewalks and distribute them either through first-come, first-serve permit rationing or by selling permits to the highest bidder. We are confident that many more options exist for the city, so long as they do not treat newsracks differently according to the content of the publication inside." (J.A. 53-54)

The first two suggestions of the Court of Appeals that Cincinnati promulgate regulations requiring newsrack-type dispensers to be bolted to the sidewalk and establishing guidelines for color and design may be permissible. They may even be good suggestions. However, they simply do not reflect the judgment of Cincinnati's local lawmakers that newsrack-type dispensers containing solely commercial speech should not be permitted to

occupy city sidewalks on a semi-permanent basis. In other words, while Cincinnati legislators may have chosen to effectuate their goals of safe and esthetic public ways in the manner suggested by the Court of Appeals, they did not do so and they are not *required* to do so under the First Amendment. City legislators may decide that, with regard to newsrack-type dispensers affixed to the sidewalk, the best way to alleviate the problems posed is to prohibit them, so long as the regulation comports with the requirements of the *Central Hudson* test. In *Ward* this Court noted:

"So long as the means chosen are not 'substantially broader' than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech restrictive alternative." 491 U.S. at 800.

"The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate, or how that level of control is to be achieved. (Citations omitted) The Court of Appeals erred in failing to defer to the City's reasonable determination that its interests in controlling volume would be best served by requiring Bandshell performers to utilize the city's sound technicians." *Id.*

Cincinnati's decision not to permit newsrack-type dispensers containing commercial publications is not constitutionally infirm merely because the Court of Appeals can construct less restrictive measures that might promote the city's goals. Rather, the Court must defer to

Cincinnati's legislative determination that their goals can best be furthered by refusing to permit newsrack-type dispensers containing only commercial speech being affixed to the sidewalk.

More troubling, however, are the Court of Appeals' suggestions that Cincinnati may establish a maximum number of newsrack-type dispensers permitted on city sidewalks³ and "distribute them either through first-come first-serve permit rationing or by selling permits to the highest bidder". (J.A. 54) Nowhere in available First Amendment jurisprudence is First Amendment protection found to be dependent upon the alacrity with which one applies for a permit, nor especially upon how much money one has available to spend on such a permit. Both of these suggestions present serious constitutional problems. The first-come first-serve option would obviously favor existing, more established publishers who would quickly become familiar with the permitting system. Favoring established publications over publications that are not well established runs directly contrary to core First Amendment values of fostering a robust exchange of differing opinions in a market place of ideas. Rather, such a system would favor the entrenchment of existing, well accepted viewpoints over those who would challenge such views. It would also involve government in allowing established publishers sole and exclusionary use of public sidewalks. Such a system is obviously flawed. Favoring publications with the most money to spend would create

³ Which the city may, and as a practical matter must do if any space on the sidewalk is to be preserved for pedestrian and other traffic.

much the same problems, and is completely abhorrent to any value to be found within the Constitution. City streets and sidewalks are held in trust for the public, this means all the public⁹ not just those "highest bidders" with the ability to pay. Cincinnati's lawmakers should be applauded, not criticized, for having the judgment, wisdom and foresight to avoid such schemes.

This Court has repeatedly held that regulatory schemes which burden both commercial and noncommercial speech may not favor commercial speech over non-commercial speech. As this Court held in *Metromedia*:

"[O]ur recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. . . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages." 453 U.S., at 513.

This Court also held in *Ohrlik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978):

"To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a levelling process of the force of the Amendments guarantee with respect to the latter kind of speech." *Id.*

⁹ *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 779 (White, J. dissenting) (Citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Cincinnati, therefore, could run afoul of First Amendment protections afforded noncommercial speech by affording newsrack-type dispensers containing commercial speech like treatment with newsracks containing noncommercial speech. It is obvious that the amount of sidewalk space available to accommodate newsrack-type dispensing devices is finite. To the extent that all newsrack-type dispensers are afforded an equal opportunity to be affixed to city sidewalks, dispensers containing commercial publications may displace dispensers containing noncommercial publications or prevent dispensers containing noncommercial speech from occupying sidewalk space. In other words, equal treatment may act as a *de facto* obstruction to the distribution of noncommercial publications. Space which could be occupied by a newspaper or other noncommercial publication would be unavailable, having been previously appropriated by a dispenser containing a purely commercial advertisement, such as Discovery's or Harmon's advertising brochures. To the extent that space occupied by such commercial publications is unavailable to non-commercial publications, which have a greater degree of protection under cases such as *Ohralik* and *Metromedia*, a regulatory scheme permitting such a result is constitutionally impermissible.

In any event, Cincinnati's regulatory scheme as applied to the city's refusal to allow Discovery and Harmon to place their newsrack-type advertising dispensers to city sidewalks burdens no more speech than is necessary to promote the city's interest in maintaining a safe and esthetic right-of-way. Since the regulatory scheme as applied, satisfies all of the requirements of the *Central Hudson* test, the scheme must be upheld.

II. CINCINNATI'S REGULATORY SCHEME PROHIBITING DISCOVERY AND HARMON FROM PLACING THEIR NEWSRACK-TYPE DISPENSERS ON THE CITY'S SIDEWALKS IS A CONSTITUTIONAL TIME, PLACE AND MANNER REGULATION.

In *Ward*, this Court restated the test for determining whether a particular regulation is a constitutional time, place or manner restriction¹⁰:

[T]he government may impose reasonable restriction on the time, place or manner of protected speech provided the restrictions are *justified* without regard to the content of the regulated speech, that they are *narrowly tailored* to serve a *significant governmental interest* and that they leave open *ample alternative channels* for communication of the information. (Emphasis added.) 491 U.S. at 741. (Citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648

¹⁰ While Cincinnati's regulatory scheme is a reasonable time, place and manner restriction it is not clear that the City must satisfy this test. It seems that a reasonable time, place and manner restrictions may subject the government to a slightly higher standard of scrutiny than the application of the *Central Hudson* test. This would make sense since reasonable time, place, and manner restrictions may be applied in a noncommercial speech context. For example, while time, place and manner restrictions must be "content neutral," regulation of commercial speech, measured against the *Central Hudson* standard may apparently be content based. See, e.g. *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 378 (1986).

(1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).)

A. Content Neutrality

The principal inquiry in determining content neutrality in speech cases generally and in time, place and manner cases in particular is whether the government has adopted a regulation of speech because of disagreement of the message it conveys. *Clark v. Community for Creative Non-Violence*, 468 U.S., at 295. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content-neutral so long as it is justified without reference to the content of the regulated speech. *Ward*, 491 U.S., at 491. In other words, the regulation in question must not contravene the fundamental principle that underlies "content based" speech regulations: that government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less forward and more controversial views. *Renton*, 475 U.S., at 48-49.

The Court of Appeals incorrectly held that Cincinnati's regulatory scheme is not content neutral because it treats newsrack-type advertising dispensers differently than dispensers containing noncommercial speech. Cincinnati may treat dispensers containing commercial speech and noncommercial speech differently and in fact,

must treat them differently. *Metromedia*, 453 U.S. at 513,¹¹ *Ohralik*, 436 U.S. at 455-456. This differing degree of treatment for differing types of speech does not violate the content neutrality requirement. The regulatory scheme is directed solely at the esthetic and safety problems caused by newsrack-type dispensers and not at any viewpoint that the city finds objectionable with which Cincinnati disagrees.¹² Cincinnati is merely attempting to provide a safe and esthetically pleasant right-of-way; it is not attempting to "suppress the expression of unpopular views." *Renton*, 475 U.S. at 48. As this Court noted in *Renton*:

"If the city had been concerned with restricting the message purveyed by adult theatres, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." *Id.* (citing Justice Powell in *Young v. American Mini Theatres*, 427 U.S. 50 at 82 n.4.)

¹¹ "Insofar as the city tolerates billboards at all, it cannot choose to limit their conduct to commercial messages: the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Id.*

¹² The Court of Appeals notes this is its opinion at page 13:

"Neither is Cincinnati attempting to alleviate a harm caused by the content of the publications. Cincinnati is attempting to place a burden on a particular type of speech because of harms caused by the manner of delivering that speech." (J.A. 52.) (page 13 of 6th Cir. Opinion).

Similarly, if Cincinnati had been concerned with restricting the messages purveyed by Discovery and Harmon,¹³ it would have tried to close them or restrict their numbers rather than merely preventing them from affixing newsrack-type dispensers to city sidewalks. Since the city's regulatory scheme is not directed toward the content, message, or viewpoint of the publications in question, but is directed toward keeping the sidewalks safe and esthetically pleasing, Cincinnati's regulations satisfy the content neutral requirement.

B. Narrowly tailored to serve a significant governmental interest.

It is undisputed that Cincinnati has a "substantial governmental interest" in the safety and esthetics of its public ways. *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Restrictions on the time, place or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward*, 491 U.S. at 747 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Such regulation need not be the least restrictive means of furthering the governmental goal. *Ward*, at 798. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. While government may not regulate expression in such a manner that a substantial portion of the burden on

¹³ The City has no quarrel with the actual content of the publications.

speech does not serve to advance its goals,¹⁴ so long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech restrictive alternative. The validity of time, place or manner regulations does not turn on a judge's agreement concerning the most appropriate method for promoting significant government interest, or the degree to which those interests should be promoted. *Ward*, 491 U.S., at 800. In *Ward*, this Court stated:

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing band during performances. Absent this requirement, the city's interest would have been served less well, as evidenced by the complaints about excessive volume generated by respondent's past concerts. *Id.*

The Court of Appeals erroneously held that Cincinnati's regulatory scheme was not narrowly tailored because, it claimed, a wide range of less burdensome options was available to the city to further its goals of safety and esthetics. (J.A. 56.) That is irrelevant, as was earlier noted. The City is not required to use the least restrictive means. However, not allowing Discovery and

¹⁴ As has been noted, the application of Cincinnati's regulatory scheme to Discovery and Harmon actually burdens less speech than would be necessary to fully achieve Cincinnati's goals. No burden is placed on speech outside the sidewalks.

Harmon to affix their dispensers to the sidewalk does not burden substantially more speech than necessary to achieve Cincinnati's desired governmental goal. In fact, Cincinnati has burdened *less* speech than necessary to fully accomplish its ends, for it allows newsrack-type dispensers containing noncommercial speech. Therefore, Cincinnati's regulatory scheme, as applied in this case, is "narrowly tailored to serve significant governmental goals."

The Court of Appeals further held that the City's regulatory scheme was not content neutral because:

"Cincinnati's hypothetical argument only addresses the enforcement of the ordinance.¹⁵ The ordinance itself was on the books long before this problem arose. There is no argument advanced that the ordinance's ban on distribution of commercial handbills, by any method, not merely by newsracks, was not directed against commercial speech based on its content." (J.A. 56-57.)

It is difficult to see how the longevity of Cincinnati's regulatory scheme could possibly bear any relationship to whether or not the ordinance is content neutral. The two issues seemingly have nothing to do with one another.

¹⁵ Why the Court of Appeals focuses upon one ordinance out of an entire regulatory scheme cannot be explained. The ordinance to which the Court refers (C.M.C. § 714-23) is merely one part of an overall scheme. The scheme in its *totality* is the relevant inquiry; not merely one aspect of the scheme. However, as to the constitutionality of § 714-23, see, *Valentine v. Christensen*, 316 U.S. 52 (1942) (similar ordinance constitutional as applied to distribution of handbills).

Likewise, whether all or only one of the methods of distribution are permitted has no bearing upon the content neutrality requirement.¹⁶ Since there is no logical relationship between these factors and the content neutrality requirement, it is relatively clear that the Court of Appeals erred in relying upon such factors to find that Cincinnati's regulatory scheme was not content neutral.

However, it seems the Court of Appeals seems to suggest that *Discovery* and *Harmon* may challenge Cincinnati's commercial handbill regulatory scheme as facially overbroad. Clearly, that is not the case. As the Court of Appeals repeatedly notes, Cincinnati's regulatory scheme, by its own terms, applies only to commercial speech. This Court has held that the overbreadth doctrine, an exception to the standing requirement, has no application in a "commercial speech"¹⁷ context. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-381 (1977). As the opinion in *Bates* observed:

"In the usual case involving a restraint on speech, a showing that the challenged rule served unconstitutionally . . . to suppress speech would end our analysis. In the First Amendment context the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in

¹⁶ This inquiry more properly relates to whether there are ample alternative channels of communication available, the third prong of the test.

¹⁷ *Discovery* and *Harmon* seek to distribute commercial speech as differentiated from those who may merely have a commercial interest in speech.

fact his specific conduct was protected. (citations omitted.) Having shown that the disciplinary rule interferes with protected speech appellants could expect to benefit, regardless of the nature of their acts.

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the Court. (citations omitted.) The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. (citations omitted.) Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly if at all in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S. at 771 n.24 there are 'commonsense differences' between commercial speech and other varieties. (citation omitted.) Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* at

380-381. (Emphasis added.) (See also *Metro-media*, 453 U.S., at 504 n.11.)

Since Cincinnati's regulatory scheme affects only commercial speech, an overbreadth analysis is inappropriate. While the Court of Appeals did not specifically state that it was applying such an analysis, clarification is warranted. The overbreadth doctrine simply does not apply in a commercial speech context¹⁸. Rather, Discovery and Harmon must challenge Cincinnati's regulatory scheme as it applies to their particular conduct. Cincinnati's regulatory scheme prohibiting Discovery and Harmon from affixing newsrack-type advertising dispensers to public sidewalks is narrowly tailored to serve Cincinnati's significant governmental interest in providing a safe and esthetically pleasant right-of-way.

The Court of Appeals also interpreted this prong of the reasonable time, place and manner regulation test as requiring "government to choose the *least restrictive means* to further the governmental interest." (J.A. 57-58.) However, this Court noted in *Ward*¹⁹:

Lest any confusion on the point remain, we reaffirm today that a regulation of time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate

¹⁸ This is also true with regard to the application of the *Central Hudson* test. Overbreadth analysis simply is inapplicable under *Bates*.

¹⁹ Somewhat confusingly the Court of Appeals actually cites *Ward* at page 15 of its Opinion. (J.A. 56.)

content neutral interests but that it need *not* be the least-restrictive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that could be achieved less effectively absent the regulation." (citations omitted.) *Ward*, 491 U.S., at 748.

The Court of Appeals, therefore, erred in holding Cincinnati's regulatory scheme to a least restrictive means standard.

C. Ample Alternative Channels

In order to be upheld as constitutional, time, place and manner regulations must leave open ample alternative channels for communication of the information. *Clark v. Community for Non-Violence*, 468 U.S. 288, 293 (1984). Sixty-six percent (66%) or two thirds (2/3) of Discovery's advertising brochures are distributed through means other than newsrack-type dispensers. Eighty-five percent (85%) of Harmon's advertising brochures are distributed through means other than newsrack-type dispensers. Cincinnati's regulatory scheme narrows only one channel of communication. It does not prohibit Discovery or Harmon from distributing their advertisements through the mail or on the property of consenting landowners (i.e., bookshops, newsstands, etc.) Unlike some regulatory schemes, Cincinnati's does not prohibit advertisements related to a particular topic,²⁰ it merely restricts access to public sidewalks, in order to promote the beauty and

²⁰ See, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

safety of the urban landscape.²¹ Ample alternative methods remain available to and are being utilized by both Discovery and Harmon to communicate their commercial messages.

Since Cincinnati's regulatory scheme satisfies all tests for reasonable time, place or manner restrictions as applied to prohibiting Discovery and Harmon from affixing newsrack-type advertising dispensers to city sidewalks, it is constitutional and must be upheld.

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decisions of the Court of Appeals and the District Court and uphold petitioner's statutory scheme as constitutional as applied and enter judgment in favor of petitioner Cincinnati.

Respectfully submitted,

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²¹ See, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

APPENDIX

§ 714-1-C. Commercial Handbill.

"Commercial Handbill" shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

(a) Which advertises for sale any merchandise, product, commodity or thing; or

(b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or

(c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

(Sec. 759-1-C; ordained by Ord. No. 119-1971, eff. Apr. 30, 1971; renumbered to C.M.C. 714-1-C, eff. Jan. 1, 1972; a. Ord. No. 519-1985, eff. Dec. 14, 1985; a. Ord. No. 353-1986, eff. Oct. 24, 1986.

§ 714-1-N. Non-Commercial Handbill.

"Non-commercial handbill" shall mean printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, newspaper, magazine, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature not included in the aforementioned definitions of a commercial handbill.

(Sec. 759-1-N; ordained by Ord. No. 119-1971, eff. Apr. 30, 1971; renumbered to C.M.C. 714-1-N, eff. Jan. 1, 1972)

§ 714-23. Throwing or Distributing Handbills in Public Places.

No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building.

(Sec. 759-23; ordained by Ord. No. 119-1971, eff. Apr. 30, 1971; renumbered to C.M.C. 714-23, eff. Jan. 1, 1972)

Penalty, Sec. 714-99, 714-99-A.

§ 862-1. Selling Newspapers on Streets.

Permission is hereby granted to any person or persons lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of city streets for selling newspapers, either in the morning or afternoon, where permission has been obtained from the owner or tenant of the adjoining building.

(C.O. 737-3; a. Ord. No. 414-1970, eff. Dec. 23, 1970; renumbered to C.M.C. 862-1, eff. Jan. 1, 1972)

§ 911-17. Posting Bills on Streets.

No person shall hang or track upon or attach to any pole or other structure on any street, avenue, alley, park or public ground of the city, any handbill, card, circular or other printed material, including directional signs; provided, however, that signs may be posted with the permission of the city manager or the director of public works designating the location or direction of institutions of higher learning having an enrollment in excess of 500, stadiums or arenas having a seating capacity in excess of 12,000, the Cincinnati Zoo, the Cincinnati Union Terminal, publicly-owned parks and playfields, publicly-owned parking facilities, publicly-owned airports, the municipal vehicle testing lane, publicly-owned buildings, highway destinations, highway routes, business districts located off major thoroughfares, churches located off through highways, bridges, interchanges, or ramp connections, the Art Museum; provided further that temporary signs for special events by charitable institutions may be posted with the approval of the city manager; provided further, that temporary signs giving notice of public hearings of agencies of the city of Cincinnati may be posted in locations approved by the city manager; and provided further that newspapers of general circulation in the city of Cincinnati may be sold from racks, containers and bags attached to poles and other structures on city sidewalks in accordance with rules and regulations promulgated by the city manager relating to the safety and unobstructed use of the streets by vehicular and pedestrian traffic.

Whoever violates this section shall be guilty of posting bills on streets, a minor misdemeanor.

(C.M.C. 911-17; ordained by Ord. No. 523-1973, eff. Jan. 1, 1974; a. Ord. No. 413-1976, eff. Sept. 9, 1976)

Analogous to C.O. 901-p9; a. Ord. No. 246-1957, eff. July 19, 1957; a. Ord. No. 334-1959, eff. Oct. 30, 1959; a. Ord. No. 24-1960, eff. Feb. 19, 1960; a. Ord. No. 400-1960, eff. Dec. 23, 1960; a. Ord. No. 156-1966, eff. May 27, 1966; a. Ord. No. 414-1970, eff. Dec. 23, 1970; a. Ord. No. 156-1973, eff. May 4, 1973; r. Ord. No. 523-1973, eff. Jan. 1, 1974.

EXHIBIT 1

AMENDED REGULATION NO. 38

In accordance with Section 911-17 of the Cincinnati Municipal Code, the following rules and regulations are promulgated in regard to the dispensing of newspapers of general circulation from devices located within the Public Right-of-Way.

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. The site plan must show all existing street furniture including other newspaper dispensing devices. The site plan shall be of such scale and detail to allow the reasonable determination of pedestrian obstruction, aesthetics, driver sight distance and any other factor influencing the public safety. The method of attachment of each newspaper device to the sidewalk, post or other fixed object shall be depicted on the site plan. Where attachment is impracticable, an explanation of same is required. The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the device. Approval or denial must be determined within five business days. A request to place newspaper vending device in the public right-of-way and site plan shall be in the form attached hereto as Exhibit A. The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection. Such objection shall be heard by the City Manager or his designee.

A site plan is not required for devices in place as of the date of this Amended Regulation.

2. All persons, partnerships or corporations operating newspaper vending devices must provide the City Manager or his designee with a location inventory of such devices located within the public right-of-way. The location inventory must be updated yearly in July. Such inventory need not consist of a listing of locations, depiction on a street plat is acceptable. The initial inventory shall not be required until October 1, 1984. ~~All~~ devices must meet the site plan criteria as out-lined in item #1 above.
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems.
4. Each newspaper vending device shall be maintained and kept in good repair at all times. The owner/operator of newspaper dispensing devices within the public right-of-way shall have on file with the City Manager or his designee proof of current comprehensive liability insurance covering the newspaper dispensing devices they own. Compliance with this provision shall occur on or before July 17, 1984.
5. No advertising media shall appear on newspaper dispensing devices located within the public right-of-way except for the name and price of the publication, and promotion of the publication itself or written articles contained therein.
6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person, a representative who can be reached during usual business hours, with the City Manager or his designee. This contact person shall be

able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

7. If, upon written notification or such other method of notification consistent with an emergency or critical situation, the owner/operator of a newspaper dispensing device fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the offending dispensing device shall be removed from the right-of-way and the owner/operator shall be billed for the cost of the removal and storage of the device. In all non-emergency situations, the owner/operator shall have five business days to request an opportunity to object to the order to remedy violations. The objection of the owner/operator shall be heard within five business days of the request. Such objection shall be heard by the City Manager or his designee.

Approved:

/s/ Sylvester Murray
Sylvester Murray

Dated: June 1, 1984

⑨
No. 91-1200

Supreme Court, U.S.
FILED

JUN 1 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the City's ban on Discovery Center's and Harmon's newsracks fails to directly advance the particular safety and aesthetics-related interests which the City espouses, in violation of the first amendment, because it leaves unaddressed the problems of lack of uniformity in design and placement, and the potential for proliferation, posed by all newsracks collectively.
2. Whether the City's ban represents an unreasonable fit between the City's goals and the means chosen to effectuate those goals, in violation of the first amendment, because it imposes all of its regulatory burden upon Discovery Center's and Harmon's newsracks in exchange for *de minimis* benefits for the City's interest in addressing the safety and aesthetics-related problems posed by all newsracks collectively.
3. Whether, in the absence of evidence that newsracks have differential effects upon the City's safety and aesthetics-related interests depending upon the type of publication they contain, the City's ban on Discovery Center's and Harmon's newsracks creates an unconstitutional content-based distinction that cannot be justified by the City's interests in addressing the safety and aesthetics-related problems posed by newsracks collectively.
4. Whether the City's regulatory scheme is unconstitutional on its face, because it vests unbridled discretion in city officials to permit or to deny speakers access to the public right of way through newsracks or through other means.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner The City of Cincinnati, Ohio

Respondent Discovery Network, Inc.

Respondent Harmon Publishing Company, Inc.

The Respondents' statements pursuant to Rule 29.1 of the Rules of this Court are set forth in their Brief in Opposition to the Petition for Writ of Certiorari, at page 3 note 1.

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No. 91-1200

In The
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THE CITY OF CINCINNATI,

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DISCOVERY NETWORK, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, J. A. 37, is reported at 946 F.2d 464. The opinion of the United States District Court for the Southern District of Ohio, J. A. 25, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 11, 1991. The Petition for a Writ of Certiorari was filed on January 9, 1992. This Court granted the Petition on March 9, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and is not disputed.

**CONSTITUTIONAL PROVISIONS, STATUTES,
AND MUNICIPAL ORDINANCES
AND REGULATIONS INVOLVED**

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The texts of the following sections of the Cincinnati Municipal Code and City of Cincinnati Administrative Regulations are set forth in the Joint Appendix or in the Appendix to Petitioner's Brief:

Cincinnati Municipal Code

Section 714-1-C	Petitioner's Brief 1a
Section 714-1-N	Petitioner's Brief 1a
Section 714-23	Petitioner's Brief 2a
Section 862-1	Petitioner's Brief 2a
Section 911-17	Petitioner's Brief 3a

City of Cincinnati Administrative Regulations

Amended Regulation 38	J. A. 206
Administrative Regulation 67 (May 31, 1991)	J. A. 362
Administrative Regulation 67 (Revised, April 1, 1992)	J. A. 375

STATEMENT OF THE CASE

A. Procedural Posture

On June 1, 1990, Respondents Discovery Network, Inc. ("Discovery Center") and Harmon Publishing Company, Inc. ("Harmon") filed a complaint in the district court pursuant to 28 U.S.C. §1343 and 42 U.S.C. §1983,

challenging Petitioner The City of Cincinnati's ("City") regulatory scheme prohibiting the distribution of commercial handbills on the public right of way, both facially and as applied to their newspaper dispensing devices ("newsracks"). J. A. 3. Discovery Center and Harmon sought declaratory and injunctive relief, alleging that the City's scheme violated their first and fourteenth amendment rights of freedom of speech and equal protection of the laws, and their fourteenth amendment right to procedural due process. *Id.* at 8-9. Upon the City's agreement not to enforce its regulatory scheme pending a decision on the merits, the district court consolidated the hearing on Discovery Center and Harmon's motion for preliminary injunction with the hearing on the merits, pursuant to Fed. R. Civ. P. 65(a)(2). Following that hearing, the district court entered findings of fact and conclusions of law, holding, *inter alia*, that Discovery Center's and Harmon's publications were commercial speech and that the City's regulatory scheme violated Discovery Center's and Harmon's first amendment rights.¹ J. A. 25-34. The district court found that the "fit" between the City's goals of enhancing safety and enhancing the aesthetic appeal of the right of way, on the one hand, and the total ban on

¹ The district court ruled in the City's favor on the procedural due process claim but did not reach either the equal protection claim or the facial challenge to the City's regulatory scheme. Discovery Center and Harmon did not cross-appeal from the district court's judgment on the procedural due process claim or from its determination that their publications are commercial speech.

Discovery Center's and Harmon's newsracks, on the other, was "unreasonable," under this Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). J. A. 32-33. The district court found that the ban was an "excessive" method of effectuating the City's goals. *Id.* at 32. The district court found that only sixty-two of the total fifteen hundred to two thousand newsracks on the public right of way were affected by the ban. *Id.* Since the number of newsracks prohibited was "minute" in comparison with the total number of newsracks the City was permitting to remain on the right of way, the district court found that the effect of the ban on the City's goals was "minimal." *Id.* The district court entered judgment on August 23, 1990. *Id.* at 35. The City filed a timely Notice of Appeal. *Id.* at 36. On October 30, 1990, the district court stayed execution of its judgment pending appeal.

On October 11, 1991, following briefing and oral argument, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the judgment of the district court and entering judgment accordingly. J. A. 37-58. Relying upon this Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and other decisions of this Court addressing the regulation of various kinds of commercial speech, the court of appeals reasoned that because Discovery Center's and Harmon's speech was neither false nor misleading, nor promoted activity the City could regulate as detrimental to its interests, it must be accorded "high value" in conducting the cost/benefit

analysis required by this Court in *Fox*. *Id.* at 52-53. The "high value" of Discovery Center's and Harmon's publications, both for their readers and for society as a whole, and the "very heavy" costs to Discovery Center and Harmon, and to society, resulting from the City's ban were not outweighed by the "paltry gains in safety and beauty" that the ban yielded. *Id.* at 53. Therefore, the court of appeals concluded, the City's ban failed to satisfy this Court's requirement in *Fox* that the fit between the substantial governmental interests sought to be furthered by a regulation burdening commercial speech and the means chosen to further those goals be "reasonable," in order to comport with the first amendment. *Id.* The court of appeals noted that the city's ban could not survive analysis as a reasonable time, place or manner regulation, because it "treat[ed] newsracks differently on the basis of the commercial content of the publications distributed." *Id.* at 54. As the City's own arguments were based upon its assertion that commercial speech is entitled to "lesser protection" than non-commercial speech, it was clear that the City's ban was not "justified without reference to the content of speech," and was, therefore, not content-neutral. *Id.* at 54-55 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). Finally, the court of appeals determined that the ban could not survive the "least restrictive means" analysis this Court has fashioned for determining the constitutionality of content-based regulations. *Id.* at 57-58. The City filed a timely Petition for a Writ of Certiorari in this Court, which granted the Petition on March 9, 1992.

B. Facts

Discovery Center is an Ohio corporation that promotes, for a fee, non-credit life-long learning programs, recreational opportunities and social events for individuals in the greater Cincinnati area. Verified Complaint, J. A. 4. Discovery Center promotes and publicizes its programs by distributing a free magazine that is published nine times per year. *Id.* at 5. Pl.Ex. 24; J. A. 125, 171. In February, 1989, the City issued Discovery Center a permit to distribute its magazine in newsracks located on City sidewalks. J. A. 6. The permit was issued pursuant to Amended Regulation 38, which, at all times relevant, governed the method of placement of newsracks containing "newspapers of general circulation" upon the public right of way with respect to vehicular and pedestrian traffic and ramps for the handicapped and regulated the manner in which newsracks advertised the publications they contain. Pl.Ex. 1; J. A. 206, 66, 171. Discovery Center purchased fifty newsracks, thirty-eight of which were placed in various locations in downtown Cincinnati, all in locations preapproved by the City. J. A. 131, 133-34. Approximately one-third of the Discovery Center magazines being distributed in the City of Cincinnati are distributed by means of these newsracks. *Id.* at 138.

Discovery Center's newsracks are free-standing metal dispensing machines approximately three feet high, three feet wide, and eighteen inches deep and comprise a dispensing box set upon either a pedestal or a four-legged stand. J. A. 5. At all times relevant, Discovery Center's newsracks were affixed to certain sites such as light poles by means of chains, as were numerous newsracks belonging to local and national newspapers. J. A.

134; Pl.Ex. 33B-D; J. A. 400-02, 83-85, 171. Discovery Center's newsracks were at all times relevant in compliance with the requirements of Amended Regulation 38. J. A. 6.

Harmon is a New Jersey corporation registered to do business in Ohio that publishes and distributes magazines advertising real estate in locations throughout the United States, including the greater Cincinnati area. Verified Complaint, J. A. 5. Harmon distributes a free publication, *Homes Magazine*, through free-standing, weighted plastic newsracks placed in twenty-four locations in the Cincinnati area. *Id.*; Pl.Ex. 25; J. A. 150, 171. In addition to its listings and photographs of residential real estate for sale and for rent in the Cincinnati area, *Homes Magazine* periodically contains articles about subjects such as trends in mortgage rates, financing options and the like. J. A. 154, 167. Approximately fifteen percent of the magazines Harmon distributes in the Cincinnati area are distributed through its newsracks. *Id.* at 168. On July 21, 1989, the City approved Harmon's request for a newsrack permit pursuant to Amended Regulation 38. Pl.Ex. 9; J. A. 222, 157, 171. As was true of Discovery Center's devices, at all times relevant Harmon's newsracks fully complied with Amended Regulation 38. J. A. 6.

On February 7, 1990, the City Council of the City of Cincinnati passed a motion requiring the City's Department of Public Works to enforce the City's existing ordinances governing the distribution of "commercial handbills" on the public right of way so as to bar from the right of way newsracks from which "commercial handbills" were distributed. Pl.Ex. 10; J. A. 236, 158, 171. Pl. Ex. 16; J. A. 238, 118, 171. Pl.Ex. 2; J. A. 229, 100, 171. The City Manager reported that, pursuant to Sections

714-23 and 714-1-C of the Cincinnati Municipal Code and Amended Regulation 38, he would henceforth instruct the Public Works Department to approve newsrack requests only for "publications primarily presenting coverage of, and commentary on, current events." Pl.Ex. 2; J. A. 230, 100, 171.

On March 8, 1990, the City sent identical letters to Discovery Center and Harmon, advising them that their respective publications had been deemed "commercial handbills" under Section 714-1-C and revoking their newsrack permits. Pl.Ex. 16; J. A. 238, 118, 171. Pl.Ex. 10; J. A. 236, 158, 171. Administrative hearings were held regarding the City's order revoking Discovery Center's and Harmon's newsrack permits on April 5, 1990, and April 26, 1990, respectively. Both Discovery Center's and Harmon's appeals were denied, and each was ordered to remove its newsracks from the City right of way. Pl.Ex. 17; J. A. 244, 171; R. 89. Pl.Ex. 12; J. A. 246, 159, 171. The instant litigation then ensued.

At the hearing in the district court, City Architect Robert Richardson testified that, although the City has since 1979 attempted to develop aesthetic standards governing structures upon the City's right of way, none has been enacted into law. J. A. 63, 67. The City had drafted and was intending to enforce a set of guidelines developed in cooperation with newspaper publishers which would regulate not only the placement of vending devices but also their design, imposing a degree of uniformity in size and appearance which the City Architect found desirable. *Id.* at 67-71, 75. The City had not included Discovery Center or Harmon in its negotiations concerning these guidelines, which, at the time of the

hearing, had been embodied in a proposed administrative regulation dated June 14, 1990. *Id.* at 70-71, 74. Pl.Ex. 3; J. A. 247, 68, 171.

The City Architect conceded that there was "nothing wrong with" Discovery Center's and Harmon's newsracks from an aesthetic point of view. J. A. 74. Furthermore, he was not aware of any safety problems caused either by Discovery Center's or Harmon's newsracks. *Id.* at 75. Indeed, the City Architect testified that were Discovery Center and Harmon to use the same newsracks as the newspapers, or any other device deemed appropriate by the City, he would have no aesthetic objection. *Id.* at 71, 75, 79-80. His concern was that if some publications deemed "commercial handbills" were allowed to have dispensing devices on the public right of way, others would follow and "the numbers could become a significant problem." *Id.* at 74. He also testified, however, that the same proliferation concerns would be implicated if additional numbers of publishers of publications not deemed "commercial handbills" sought to place dispensing devices on the public right of way. *Id.* at 75.

According to the City Architect, all newsracks, collectively, posed aesthetic problems due to their lack of uniformity in design. J. A. 78-79. The problem of rusting of City poles caused by the chains used to secure newsracks raised safety and aesthetic concerns implicating all newsracks on the right of way. *Id.* at 79-80. Similarly, the City Architect's concerns with respect to aesthetics, location and quantity related to all newsracks, regardless of the type of publication they contained. *Id.* at 84-85. If the quantity and size of newsracks were regulated in some

manner, the City Architect testified, those concerns would be satisfied. *Id.* at 86.

City Engineer Thomas Young, whose office is responsible for issuing newsrack permits, testified that Discovery Center's and Harmon's permits were the first to be requested by publications that were not newspapers. J. A. 117. Until the City determined to remove Discovery Center's and Harmon's newsracks from the right of way, there was no problem with those newsracks. *Id.* at 115. The City Engineer knew of no damage or injury claims attributed to Discovery Center's or Harmon's newsracks. *Id.* at 96. He was aware of only one complaint regarding either Discovery Center's or Harmon's newsracks, that from a merchant who objected to the placement of a Discovery Center newsrack near her store (a complaint which Discovery Center had readily addressed and remedied). *Id.* at 96-99, 134.

The City Engineer testified that the decision to revoke Discovery Center's and Harmon's newsrack permits was related to the general problem of "the proliferation of [the newsrack]." J. A. 116. Discovery Center's and Harmon's newsracks were not specifically ordered removed from the City right of way because they presented safety or aesthetics problems. *Id.* at 120-21. Indeed, the City Engineer had testified earlier that, if commercial publications such as Discovery Center's and Harmon's publications "were considered legal," there was no reason why the City's proposed regulation could not be applied to them. Young Deposition, J. A. 61, 171; R. 6. It was the general "issue of proliferation of [newsracks]" which was a potential safety issue. J. A. 121. This was so,

because there was "a finite amount of space where [newsracks could] be placed on the sidewalks, particularly in the Downtown area, but this applie[d] to other areas as well." *Id.* at 201. The City Engineer estimated that at the time of the hearing there were between fifteen hundred and two thousand newsracks on the City right of way. *Id.* at 123. Only four publishers – including Discovery Center and Harmon – had applied for newsrack permits from 1989 until the date of trial. *Id.* at 198-99. Indeed, only four publishers of "commercial" publications had applied for newsrack permits in the five years that Mr. Young had served as City Engineer. Young Deposition, J. A. 59, 171; R. 6.

Discovery Center's and Harmon's witnesses testified that there was no provision of the City's proposed regulation governing newsracks with which Discovery Center and Harmon would be unable or unwilling to comply. J. A. 138, 160. Gregory G. Goff, Harmon's Vice President and Director of Marketing, testified that Harmon would "willingly put out any type of box the City would specify." *Id.* at 162. Margaret Moertl, Director of Discovery Center, testified to the same effect. *Id.* at 137. Both Mr. Goff and Ms. Moertl testified that the distribution of their publications through newsracks had unique value to Discovery Center and to Harmon. Ms. Moertl testified that the use of newsracks was "the most effective means" Discovery Center had found to reach the particular audience of individuals, representing one third of its readers, who had grown to depend upon finding its publication in public places. *Id.* at 138-39. Mr. Goff testified that Harmon had historically distributed its publication inside banks.

Id. at 162. With the advent of the automatic teller, however, a significant readership (professionals working in the downtown Cincinnati area) was lost to Harmon, as those individuals no longer frequented those banks. *Id.* at 163. In Mr. Goff's view, Harmon's use of newsracks was necessary to reach that professional downtown Cincinnati readership. *Id.*

Since the evidentiary hearing in this case, the City has twice revised its newsrack regulation and enacted guidelines governing newsracks placed in the public right of way that largely reflect the City's negotiations with representatives of newspapers described by the City architect. J. A. 67-71, 75. On May 31, 1991, following oral argument in the court of appeals, the City Manager approved Administrative Regulation 67, which provided that "no more than five newsracks could be placed at any location," and further provided that

[n]o more than two (2) newsracks in one location may contain commercial handbills as defined in Section 714-1-C of the Cincinnati Municipal Code unless there are vacant positions. The third and subsequent commercial handbill dispensing devices will be displaced when newspapers are granted permits for those positions.

J. A. 362, 366-67. Administrative Regulation 67 also subjects newsracks placed in the central business district to specific design and placement requirements, limits advertising on newsracks solely to the name and price of the publication dispensed, and requires that newsracks be bolted to sidewalks. J. A. 364, 367. Administrative Regulation 67 places no limits on the number of locations

where newsracks may be placed, and, therefore, places no cap on the total number of newsracks. On April 1, 1992, the City Manager approved revised Administrative Regulation 67, which currently governs newsracks on the public right of way. *Id.* at 375. The revised Regulation does not expressly provide for the placement of newsracks containing "commercial handbills" on the public right of way. It refers only to "newsracks" and is silent with respect to the type of publication contained within those newsracks. *Id.* In all other material respects, revised Administrative Regulation 67 is identical to its predecessor.

SUMMARY OF ARGUMENT

A. 1. The ban on the placement of newsracks containing commercial handbills in the public right of way does not "directly advance" the particular safety-and-aesthetics-related interests which the City espouses, within the meaning of *Central Hudson Gas & Electric Corp. v. New York Public Service Commission*, 447 U.S. 557 (1980). In fact, the City concedes that its sidewalks will remain "visually and physically cluttered" by newsracks despite the ban. Petitioner's Brief at 11, 18. The City is attempting to address the problems caused by the lack of uniformity in design, and the irregularity of placement and alignment, among all newsracks collectively, irrespective of the type of publication they contain. Newsracks *per se* are not the object of the City's actions to enhance the safety and aesthetics of the public right of way. The City seeks merely to impose uniformity in the design and placement

of newsracks, and not to prohibit their use on city sidewalks. Discovery Center's and Harmon's newsracks are indistinguishable from other newsracks, in terms of their asserted effect upon the safety and aesthetics of the public right of way. The City has presented no evidence that newsracks are inherently antithetical to the City's safety and aesthetics-related interests.

Regardless of the subject matter of the publications they contain, newsracks are amenable to regulations prescribing their design, size, and alignment with respect to one another. That this is so is demonstrated by the newsrack guidelines promulgated by the City following its cooperative efforts solely with local newspapers, which set forth precisely such design and placement limitations. This case is, therefore, distinguishable from *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), a case which expressly concerns the unique safety and aesthetics problems associated with the non-communicative aspects of billboards. In *Metromedia*, this Court found that billboards threatened San Diego's interests regardless of their location or design. A total ban on off-site billboards, therefore, directly advanced San Diego's interests. In the absence of similar evidence regarding newsracks, the City cannot establish that the ban directly advances its interests in addressing the lack of uniformity in design and placement of newsracks. This Court's reasoning with respect to the "law of billboards" in *Metromedia*, 553 U.S. at 501, does not control this newsrack case.

2. The City's ban does not directly advance the putative problem of the proliferation of newsracks on the City right of way. Newsracks containing commercial publications are indistinguishable from newsracks containing non-commercial publications, in terms of their impact on that problem. There is no evidence that the City intends to reduce or even limit the total number of newsracks it will allow to remain on the public right of way, provided they contain "non-commercial" publications. Neither Amended Regulation 38, in effect at the time of the evidentiary hearing, nor Administrative Regulation 67, which currently governs newsracks on the public right of way, sets limits on the total number of newsracks permitted. Unlike the ordinance at issue in *Metromedia*, which wholly eliminated off-site billboards as a medium of commercial expression, the City's ban does nothing to limit the presence of the asserted "problem," i.e., the newsrack. Since so many newsracks affecting the City's interests remain on the public right of way despite the ban, the ban can have only an inconsequential benefit for the City's interests and, therefore, cannot directly advance those interests. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811-12 (1984); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

B. 1. The City's ban fails to satisfy the *Central Hudson* requirement that it regulate commercial speech in a manner that is no more extensive than is necessary to serve the City's interests. The City has failed to "carefully calculate" the cost of its ban both to Discovery Center

and Harmon and to the public interest, as required by *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). The speech contained in Discovery Center's and Harmon's publications is neither false nor misleading; it concerns fully protected activity. *Harmon Homes* advertises the availability for sale or rent of residential real estate, information which this Court has deemed worthy of first amendment protection because it "bears on one of the most important decisions [individuals] have a right to make: where to live and raise their families." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). *Harmon Homes* periodically contains articles about financing strategies, mortgage rates, and the like, educational information having an importance beyond the "mere" proposal of a commercial transaction. Discovery Center's magazine provides information about learning opportunities that is undeniably important both to individuals and to the public as a whole. This is not to suggest that the commercial component of Discovery Center's and Harmon's speech is not itself worthy of protection. Commercial speech which is neither false nor misleading, and which promotes activity that is not at odds with any governmental interest, plays a critical role in the marketplace of ideas. *Virginia Pharmacy Board*, 425 U.S. at 763. As the public and individual value of Discovery Center's and Harmon's speech is high, the costs of the City's ban are inordinately heavy. The ban totally denies Discovery Center and Harmon access to the means of distributing thirty-three and fifteen percent, respectively, of their publications in the Cincinnati area. The ban precludes Discovery Center and Harmon from placing their newsracks in public places, and therefore

deprives them of a uniquely effective medium of communication. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762 (1988). The public costs of the ban are equally onerous, because the ban restricts public access to valuable information about real estate and educational opportunities, unless such information appears in publications permitted by the City to be distributed by means of newsracks.

2. In contrast to the heavy costs it imposes upon commercial speech, the ban affords *de minimis* benefits for the City's interests in addressing the safety and aesthetic problems posed by the lack of design and placement uniformity among newsracks collectively. This is so, largely for the factual reasons that the ban fails to "directly advance" the City's interests, within the meaning of *Central Hudson*. The ban affects only sixty-two of a total of between fifteen hundred and two thousand newsracks currently on City sidewalks. The effect a particular newsrack has on the safety or aesthetics of the public right of way in Cincinnati bears no relation to whether it contains "commercial speech" or "non-commercial speech." Therefore, the City has failed to demonstrate that its ban, which draws distinctions among newsracks based upon the character of the publications contained *inside* them, is narrowly tailored to achieve its goal of addressing the characteristics of newsracks that it asserts are detrimental to its interests. *Fox*, 492 U.S. at 480. There are means of addressing the design and placement problems of all newsracks that are far less restrictive of commercial speech, and that attack those problems far more precisely, than the City's ban solely on newsracks containing commercial speech. This is not mere speculation, for the City has in fact adopted design and placement

limitations for newsracks, albeit only for newsracks containing "non-commercial" publications. The City's ban leaves unaddressed the problems the City has identified and does so at an "inordinate" cost to commercial speech, in violation of the first amendment. *Id.*

C. The City's ban is not a content-neutral means of regulating the time, place, or manner of dissemination of speech. The ban is not directed solely at the problems caused by newsracks collectively. The City is enforcing an unambiguously content-based ordinance, which bans only "commercial" handbills from the public right of way. The City's sole justification for its ban has been its ability to draw a content-based distinction between commercial and non-commercial speech, due to the "lesser protection" accorded the former. This distinction, however, is irrelevant to the interests intended to be served by the ban. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. ___, 112 S. Ct. 501, 510-11 (1991). Moreover, the City has involved publishers of newspapers, but not the publishers of "commercial" publications such as Discovery Center and Harmon, in its ongoing development of newsrack design and placement requirements. The regulatory scheme governing newsracks is in part the result of a partnership between local newspapers and the City. By forcing commercial speakers to buy space in newspapers in order to have access to the public right of way, the ban imposes a financial burden on them because of the content of their speech, and is therefore presumptively unconstitutional. *Simon & Schuster*, 502 U.S. ___, 112 S. Ct. at 508. Moreover, the ban is not content-neutral under the "secondary effects" doctrine of *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), because

there is no evidence that newsracks containing commercial speech have peculiar secondary effects on the safety and aesthetics of the right of way which distinguish them from other newsracks. As a content-based regulation, the City's ban is unconstitutional because it is not narrowly drawn to address the City's concern about the lack of uniformity among newsracks. See *Burson v. Freeman*, ___ U.S. ___, No. 90-1056 (May 26, 1992); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

D. The City's regulatory scheme is unconstitutional on its face, because it places unbridled discretion in the hands of City officials to determine whether or not a publication is a "commercial handbill" and, therefore, unbridled discretion to permit or deny expressive activity on the public right of way. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The City's regulatory scheme suffers from several layers of constitutional infirmity. Section 714-23 of the Cincinnati Municipal Code is presumptively unconstitutional under *Virginia Pharmacy Board*, because it totally bans commercial speech but permits non-commercial speech on the public right of way. The Cincinnati Municipal Code defines "commercial handbill" in a manner which obliterates any distinction between "newspapers" which are permitted on the right of way as "non-commercial handbills," and "commercial handbills," which are not. The City's scheme provides no express guidelines or standards by which the categories of "commercial handbill" and "non-commercial handbill" may be distinguished. For example, a "newspaper," as that term is commonly understood, fits the City's definition of "commercial handbill." Thus, the City's scheme poses a substantial threat of content-based censorship,

whether among publications commonly thought of as "newspapers," or among publications such as Discovery Center's and Harmon's, which contain truthful commercial information about fully protected activity, or among publications falling into either category. Moreover, the City's regulation of newsracks is intimately tied to its overall scheme governing the dissemination of all speech on the public right of way in any manner, and, therefore, poses a greater threat to speech than the newsrack ordinance struck down in *Lakewood*, 486 U.S. at 778 (White, J., dissenting). The threat of content-based censorship in this case is palpable, given the City's active involvement exclusively with newspapers in drafting its newsrack regulations. Finally, although a facially invalid regulatory scheme may be saved where the government adopts a narrowing construction which provides guidance to decisionmakers charged with its enforcement, *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989), the City has not done so in this case.

ARGUMENT

I. The City's Ban On Discovery Center's And Harmon's Newsracks Fails To Directly Advance The City's Interest In Addressing the Lack of Uniformity In The Design, Placement, and Alignment of Newsracks On The Public Right Of Way.

It is undisputed that Discovery Center's and Harmon's speech concerns lawful activity and is neither false nor misleading. It is also undisputed that the City's interests in maintaining the safety and aesthetic appeal of the

public right of way are substantial, in the abstract. Therefore, the relevant inquiry in this case must begin with a determination of whether the City's ban on Discovery Center's and Harmon's newsracks "directly advances" the City's safety and aesthetic interests. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). The resolution of this issue requires a factual inquiry into the connection between the government's asserted interests and the method of regulating commercial speech chosen to address those interests. See *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 462, 475-76 (1989). Where that connection is "tenuous," "remote" or "ineffective," this Court has held that the interests asserted cannot support a ban on commercial speech. *Central Hudson*, 447 U.S. at 564, 569 (argument that prohibition on advertising promoting power usage furthers state goals of protecting equity and efficiency of utility rate structure held "highly speculative"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 378 (1977) (disciplinary rule prohibiting advertisement of prices of legal services held an "ineffective" means of addressing state's substantial interest in safeguarding the quality of attorneys' work); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977) (no support in record for city's assumption that prohibiting "For Sale" signs will advance city's goal of decreasing concern over home sales and thereby promote racially integrated housing, where evidence fails to establish substantial incidence of panic selling or that "For Sale" signs are a "major cause" of panic selling); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976) (ban on drug price advertising "does not directly affect

[state's substantial interest in protection of pharmacists'] professional standards one way or the other"). Cf. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341-42 (1986) (given "immediate connection" between advertising of casino gambling and increased demand for casino gambling, ban on such advertising directly advances legislative goal of combatting ill effects of casino gambling) (citing *Central Hudson*, 447 U.S. at 569). The ban on Discovery Center's and Harmon's newsracks must be measured against this Court's admonition that "[a] regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564.

The City Architect and the City Engineer testified that newsracks, *regardless of their content*, "detract from" the safety and aesthetic appeal of the public right of way. J. A. 181, 183, 193. There is, however, no evidence in the record that newsracks *necessarily* undercut the City's interests. The City Engineer testified that newsracks "*can*" affect public safety "*if they are improperly positioned*," as would be the case if they obstructed sidewalks or ramps for the disabled, or if they were too numerous at a particular location. *Id.* at 193-94 (emphasis added). The City Architect stated that his concern was not that any newsrack was "*in itself*" offensive to the City's aesthetic interests. *Id.* at 187. It was the lack of uniformity among newsracks generally, in terms of their placement and alignment on the public right of way and their design, which posed the aesthetic problem. *Id.*; J. A. 78-80, 84-86. That newsracks, *qua* newsracks, were not the object of the City's actions to enhance the safety and aesthetics of the

public right of way is clear from the City Architect's own statement that the City does not intend to do away with newsracks, but rather "want[s] to *organize* them like the other elements on the street." *Id.* at 189 (emphasis added).

Furthermore, there is scant evidence in the record that Discovery Center's or Harmon's newsracks, *in particular*, compromise the City's interests in aesthetics or public safety in any manner at all, let alone in a manner peculiar to them. As the City Engineer stated, Discovery Center's and Harmon's newsracks were not ordered removed from the public right of way because they posed any particular aesthetic or safety problem. J. A. 120-121. Indeed, the City could not have argued that the design or placement of Discovery Center's or Harmon's newsracks violated Amended Regulation 38, for that Regulation contained no design requirement at all, nor did it prohibit the attachment of newsracks to City poles by means of chains. *Id.* at 206. The testimony demonstrates that both Discovery Center and Harmon could comply with any design or placement requirements the City might devise. *Id.* at 137-38, 160, 162. This is supported by the City Engineer's testimony that there was no reason that the City's proposed newsrack regulation could not be applied equally to Discovery Center's and Harmon's boxes, were they "considered legal." *Id.* at 61.

This case is, therefore, distinguishable from *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), upon which the City relies so heavily. It is critical to examine why this Court determined that the ordinance before it in *Metromedia*, which completely prohibited off-site billboards displaying commercial speech, "directly advanced" San Diego's interests in safety and aesthetics, as required by

Central Hudson. In *Metromedia*, the California Supreme Court had held that because billboards were designed to distract a driver's attention from the road, and in fact do so distract, an ordinance eliminating those billboards reasonably relates to traffic safety. 453 U.S. at 508-09 (citing 26 Cal 3d. at 859, 610 P.2d at 412). This was so, even though there was controversy as to whether the distractions of billboards in fact caused traffic accidents. *Id.* As the legislative judgment was not unreasonable, this Court found that San Diego's safety concerns were directly advanced by the ban. *Id.* at 509. This Court looked to the inherent characteristics of billboards in deciding that the ban directly advanced the City's aesthetics concerns. "It is not speculative," this Court stated, "to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Id.* at 510 (emphasis added).

Metromedia is securely grounded in its facts, as it expressly deals with the unique problems associated with the noncommunicative aspects of billboards. As this Court stated, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards." *Id.* at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)) (emphasis added). In contrast to *Metromedia*, the instant case involves the dissemination of commercial speech through newsracks. Unlike billboards, as the evidence in *Metromedia* describes them, the newsracks in the instant case are not "intended," *Metromedia*, 453 U.S. at 508, to create a distraction for drivers or pedestrians and thus do not inherently create safety problems, "wherever located." *Id.* at

510. Moreover, there is no evidence that, in contrast to billboards, the newsracks in the instant case are aesthetically harmful "however constructed." *Id.* The record is devoid of any evidence supporting the proposition that Discovery Center's and Harmon's (or anyone else's) newsracks are not amenable to regulation less onerous (and more precise) than an outright ban in the interest of enhancing the aesthetics and safety of the city right of way. The newsracks on the city right of way are amenable to design, placement and alignment requirements that will minimize, if not eliminate, the aesthetic or safety problems postulated by the City. The best evidence that newsracks, unlike billboards, are neither inherently nor irremediably unattractive or threatening to public safety or aesthetics is the City's express intent to permit thousands of newsracks on the public right of way, subject to design and placement specifications of the City's own choosing. Without evidence demonstrating that newsracks, by their very nature and regardless of their design, offend the City's public safety and aesthetics concerns, the City has not met its burden, *Fox*, 492 U.S. at 480, of establishing that its ban "directly advances" its asserted interests. This Court's reasoning with respect to billboards in *Metromedia* does not control this newsrack case.

II. The City's Ban On Discovery Center's And Harmon's Newsracks Fails To Directly Advance The City's Interest In The Potential For The Proliferation Of Newsracks On The Public Right Of Way.

The City Architect testified that even if Discovery Center and Harmon were to use newsracks identical to those used by "non-commercial" publications, permitting their newsracks to remain on the public right of way

would raise concerns about proliferation of newsracks. J. A. 74. The City Engineer conceded that it was the general problem of "the proliferation of the [newsrack]" which caused the City to order Discovery Center and Harmon to remove their newsracks from the public right of way. *Id.* at 116. "Proliferation [of newsracks]," the City Engineer stated, "can be a safety issue and is a safety issue in some areas." *Id.* at 121. The City has apparently abandoned any proliferation-related rationale for its ban on newsracks containing commercial speech; proliferation is nowhere mentioned as a discrete concern in the City's Brief. Whatever the City's position with respect to proliferation may be, the ban does not "directly advance" an interest in the proliferation of newsracks, within the meaning of *Central Hudson*.

First, although the City Architect expressed a concern with proliferation, he conceded that concern was implicated not only by the presence of newsracks containing "commercial publications" but also by the potential that "non-commercial" publishers not yet on the public right of way would seek to distribute their publications through newsracks. J. A. 75. The City's ban does nothing to address the potential proliferation of non-commercial publishers seeking newsrack permits. Moreover, since there is no evidence of differential proliferation effects among newsracks, based upon the publications they contain, the City's proliferation concern does not justify disparate treatment of newsracks containing commercial speech. Second, there is scant evidence supporting the City Architect's hypothetical concern with proliferation in the first instance. The City Engineer testified that only four "commercial" publications, including Discovery

Center and Harmon, had sought newsrack permits during the five years preceding the time of trial. *Id.* at 59-60, 198-99. Most important, there is not an iota of evidence in the record that the City intends to place a limit on the total number of newsracks (or newsrack locations) that it will permit to remain on the public right of way, even though, as the City Engineer testified, "there is a finite amount of space where [newsracks could] be placed on the sidewalks, particularly in the Downtown area." *Id.* at 201. Amended Regulation 38 sets no upper limit on the number of newsracks. *Id.* at 206. Administrative Regulation 67, both in its May 31, 1991 and April 2, 1992 versions, limits the number of newsracks at any one location to five, but sets no limit on the number of locations. *Id.* at 362, 375. The City itself argues that, given the finite amount of space, requiring it to treat newsracks equally regardless of the character of the publications they contain would force it to deny space to "noncommercial publications." Petitioner's Brief at 28. Setting aside, for the moment, the question whether the City may draw this content-based distinction in the first instance, the ban on Discovery Center's and Harmon's newsracks utterly fails to "directly advance" any asserted interest in proliferation. There is no evidence that the total number of newsracks on the public right of way will decrease, as a result of the ban. The ban is an "ineffective" means of addressing the City's proliferation concerns and, therefore, fails to satisfy the *Central Hudson* test.

The City asserts that it has no argument with the content of Discovery Center's and Harmon's publications and that it is simply attempting to remedy the aesthetic and safety problems it claims are caused by newsracks. Petitioner's Brief at 31. Even if this were the case (and, as

discussed below, the evidence indicates the City's decided preference for newspapers over "commercial" publications), the fact that the City is content to permit thousands of newsracks to remain upon the public right of way is fatal to this argument. Whether proliferation is viewed as a discrete rationale for the City's ban or as an issue subsumed within the City's interests in the aesthetics and safety of the public right of way, the City's ban is an "ineffective," *Central Hudson*, 447 U.S. at 564, means of advancing those interests. Assuming, *arguendo*, that the presence of newsracks, regardless of their content, cannot be reconciled with the City's interests by prescribing uniformity of design, placement, or alignment, thousands of offending newsracks will be permitted to remain on the public right of way. The City essentially concedes the inefficacy of the ban in advancing its aesthetic and safety concerns, for it states that "sidewalks will remain visually and physically cluttered by newsrack-type dispensers dispensing noncommercial forms of speech such as newspapers," despite the ban. Petitioner's Brief at 11. Whereas, in *Metromedia*, the City of San Diego's proposed ban on all off-site billboards would have, as the parties stipulated, "eliminate[d] the outdoor advertising business in the City of San Diego," 490 U.S. at 497, the City's ban in the instant case does nothing to limit or reduce the asserted aesthetic and safety "problem," i.e., the newsrack. The City's ban, therefore, does not affect the asserted source of the City's problems one way or the other, and fails, on any theory, to directly advance the City's interests. *Virginia Pharmacy Board*, 425 U.S. at 769. In short, since so many newsracks adversely affecting the City's interests in safety and aesthetics will remain on the public right of way despite the

ban, the ban can have only an inconsequential benefit for the City's interests and, therefore, cannot "directly advance" those interests. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811-12 (1984) (*dicta*) (upholding content-neutral ban on temporary signs posed on public property as applied to political campaign signs). The requisite factual predicate for a determination that the City's ban directly advances the City's goals, see *id.*, is simply not present in this case.

III. The "Fit" Between The City's Ban On Discovery Center's And Harmon's Newsracks And The City's Stated Goals Of Protecting The Safety And Aesthetics Of The Public Right Of Way Is Not "Reasonable," Within The Meaning of *Board Of Trustees Of The State University Of New York v. Fox*.

Central Hudson requires both that a regulation burdening commercial speech "directly advance" the government's substantial interests and that the regulation be "no more extensive than is necessary to serve [those interests]." 447 U.S. at 566. This Court has explained that both the third and the fourth steps in the *Central Hudson* analysis involve evaluation of the "fit" between the government's ends and the means it chooses to effectuate those ends. *Posadas*, 478 U.S. at 341. Logically, the City's ban fails to satisfy the fourth step of the *Central Hudson* analysis for the factual reasons that it fails to "directly advance" the City's interests. As more fully discussed in Part I, *supra*, the problem the City is trying to address is the lack of design uniformity, as well as the irregularity and security of placement, of newsracks, collectively. The facts of this case simply permit no other conclusion than

that the City's ban is an excessive means of addressing that problem.

A. *Central Hudson* and *Fox* require balancing of government interests against speech interests in determining the constitutionality of regulations burdening commercial speech.

The City argues that, in weighing the benefits of the City's ban for its stated goals against the burden the ban imposes upon Discovery Center's and Harmon's speech, the court of appeals embarked upon an unprecedented mode of analysis. Petitioner's Brief at 18-23. Indeed, the City maintains that "*Central Hudson* requires no 'balancing test' of speech burdened against interest served." *Id.* at 22. This assertion is without merit, as it ignores the totality of this Court's commercial speech jurisprudence. In commercial speech cases preceding *Central Hudson*, this Court required the very balancing that the City considers irrelevant. The centrality of this interest balancing was clear as early as this Court's statement in *Linmark Associates* that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation" burdening speech, whether labeled as "commercial" or otherwise. 431 U.S. at 91 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)). The interest balancing that the City seeks to avoid is also obvious in this Court's consideration in *Virginia Pharmacy Board* of both the informational value of commercial advertising of drug prices and the strength of the government interests underlying the ban on such advertising. 425 U.S. at 762-770. It is equally obvious in the Court's analysis of the ban on advertisement of prices for legal services at issue in *Bates*. 433 U.S.

at 368-379. *Central Hudson* itself involves such interest balancing, 447 U.S. at 563-571.

This Court's refinement of the fourth part of the *Central Hudson* test in *Fox* permits no conclusion other than that a court must balance the interests involved, in determining whether a challenged regulation burdens commercial speech "no more broad[ly] or no more expansive[ly] than 'necessary' to serve [the government's] substantial interests." *Fox*, 492 U.S. at 476 (citations omitted). As this Court has interpreted it, the fourth *Central Hudson* criterion requires that the means/ends fit embodied by the regulation be "reasonable," and that the government "carefully calculate" the costs imposed by its regulation, in light of the "substantial" goals it is intended to further. *Fox*, 492 U.S. 480. In *Fox*, this Court eschewed both the "least restrictive means" test required by the court of appeals in that case and the "rational basis" test applicable to regulations challenged on fourteenth amendment equal protection grounds. *Id.* This Court distinguished its "reasonable fit" requirement from "rational basis" analysis, in which the inquiry is simply whether a regulation furthers a "legitimate" government purpose, "without reference to whether it does so at inordinate cost." *Id.* The question before this Court, therefore, is not, as the City would have it, whether the court of appeals *should have* analyzed the benefits of the City's ban in light of the commercial speech interests at stake, but rather whether the court of appeals *struck the proper balance* among the conflicting interests in concluding that the City had failed to meet its burden, *Fox*, 492 U.S. at 480, of affirmatively establishing that the "fit" between the ban and its stated interests in regulating the safety and aesthetic problems assertedly posed by newsracks on the public right of way

is "reasonable." This Court must answer that question in the affirmative.

B. The ban imposes heavy costs upon Discovery Center's and Harmon's speech and on the public's interest in receiving truthful commercial information that promotes fully protected activity.

From the outset of this case, the City has been guided by the assumption that Discovery Center's and Harmon's publications are not protected by the first amendment, and that its power to regulate is boundless, even though the speech at issue is not false or misleading and even though Discovery Center and Harmon promote activity that is not at odds with any governmental interest. The court of appeals rejected this assumption, and properly took into account the value that this Court has accorded speech such as Discovery Center's and Harmon's. *J. A. 52.* This Court has repeatedly recognized the value of truthful commercial speech that fosters lawful activity. As this Court stated in *Virginia Pharmacy Board*, the fact that an advertiser's interest in speaking is "purely economic . . . hardly disqualifies him from protection under the First Amendment." 425 U.S. at 762. Even more important for the instant case is this Court's recognition, beginning in *Virginia Pharmacy Board*, that commercial speech plays a critical role in the marketplace of ideas. "[T]he particular consumer's interest in the free flow of economic information . . .," this Court stated, "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

The value of commercial speech is not limited to the value it has for individuals, however. As this Court stated in *Bates*:

[S]ignificant societal interests are served by [commercial] speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

Bates, 433 U.S. at 364 (citations omitted). Accord *Linmark Associates*, 431 U.S. at 92. The information communicated by Discovery Center's and Harmon's particular publications is valuable for these very reasons. *Harmon Homes* advertises the availability for sale or rent of real estate, in particular residential real estate. J. A. 5, 151-52. This Court has said, with reference to "For Sale" signs on residential property, that information about the availability of such property is valuable and worthy of first amendment protection because it "bears on one of the most important decisions [individuals] have a right to make: where to live and raise their families." *Linmark Associates*, 431 U.S. at 96. *Harmon Homes* also provides, albeit on an irregular basis, articles about financing strategies, mortgage rates, and the like, and so periodically contains information beyond that "merely" proposing a commercial transaction. J. A. 154, 167. Discovery Center's magazine provides information about learning opportunities, *id.* at 126, the importance of which from both an

individual and societal standpoint cannot be gainsaid. Discovery Center and Harmon promote conduct that in no way implicates a governmental need to protect its citizenry, and the City has not contended as much. The content of Discovery Center's and Harmon's speech affects no City interest adversely, and the City's dismissive valuation of these publications is unwarranted. This case is, therefore, very different from a case such as *Posadas*, in which this Court held that the Puerto Rico legislature's concern with the deleterious effects of casino gambling on the health, safety and welfare of its citizens, coupled with the legislature's power to completely ban casino gambling, justified a total ban on advertisements of casino gambling directed at residents of Puerto Rico. 478 U.S. at 340-41, 345-46.

C. The ban has *de minimis* benefits for the city's interests.

The City argues that the court of appeals "improperly" analyzed the ban on Discovery Center's and Harmon's newsracks under the fourth part of the *Central Hudson* test. Petitioner's Brief at 18-28. This argument is without merit. As this Court required in *Fox*, the court of appeals took into account the costs of the ban to Discovery Center and Harmon, and measured those costs against the benefits the ban would have for the City's interests in public safety and aesthetics. J. A. 52-54. The court of appeals found, as had the district court, that the ban on Discovery Center's and Harmon's newsracks, which comprised sixty-two out of a total of between fifteen hundred and two thousand newsracks currently on City sidewalks, would have a "minuscule" effect on

the City's concerns for safety and aesthetics. *Id.* at 53. In contrast, the court of appeals correctly recognized that if the ban were held constitutional, the cost to Discovery Center and Harmon would be a heavy one: the total loss of the means of distributing thirty-three percent of Discovery Center's publications and fifteen percent of Harmon's publications in the Cincinnati area. *Id.* at 53. The City cannot minimize the impact of the ban simply by referring to the percentages of their publications that Discovery Center and Harmon remain able to distribute in the Cincinnati area despite the ban. Petitioner's Brief at 38. Both Discovery Center's and Harmon's employees testified that newsracks are uniquely important in reaching a particular targeted readership. J. A. 138-39, 162-63. This Court has recognized the particular effectiveness of newsracks as a means of communication. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762 (1988). The court of appeals also assessed the costs of the City's ban in terms of the loss to the public the ban would cause, i.e., the loss of information this Court has recognized as valuable and protected. In determining that the fit between the ban and the City's aesthetics and safety-related goals was unreasonable under *Fox*, the court of appeals recognized that "commercial speech has public and private benefits apart from [those to be derived from not imposing an undue burden on Respondents' particular commercial speech]." *Id.* at 53. As discussed above, that assessment is not without precedent in this Court.

The City asserts variously that "the degree to which [its goals are] furthered in a particular case is irrelevant" to the fourth part of the *Central Hudson* analysis and that "there is no requirement under *Central Hudson* that [its interests] be furthered a particular degree or a certain

amount." Petitioner's Brief at 10, 20. Therefore, the City contends, the court of appeals erred in holding the City's ban unconstitutional because the benefits of the ban for the City's goals are "paltry." *Id.* at 20. In so arguing, the City disregards the requirement in *Fox* that the means chosen by the government to regulate commercial speech be "narrowly tailored to achieve the desired objective." 492 U.S. at 480 (emphasis added). The City has failed entirely to justify its ban on Discovery Center's and Harmon's sixty-two newsracks on grounds that the ban achieves, even to a minimal extent, its goals of correcting the aesthetic and safety-related problems the City's own witnesses testified are posed by newsracks collectively, due to their lack of uniformity in design and placement on the public right of way. As previously discussed, the City remains content to allow the vast majority of newsracks to remain on the public right of way, subject to certain design, placement, and alignment restrictions. Therefore, the City cannot demonstrate that the distinction which it has drawn among newsracks, a distinction that bans or fails to ban newsracks based upon the character of the publications contained *inside* them, is narrowly tailored to achieve its goal of addressing the characteristics of newsracks that it asserts are detrimental to its interests. As the record in this case clearly demonstrates, the effect a particular newsrack has on the safety and/or aesthetics of the public right of way in Cincinnati bears no relation to whether it contains within it "commercial speech" or "non-commercial speech."

Thus, the total ban only upon Discovery Center's and Harmon's newsracks has *de minimis* benefits for the City's interest in addressing this problem. Furthermore, the City's ban can have no effect upon the City's goal of

addressing the potential proliferation of newsracks, because the City has placed no cap upon the number of newsracks it will permit on the public right of way (as long as those newsracks contain "non-commercial" speech), despite the "finite" amount of space available for the placement of newsracks. J. A. 201. Although the City now argues that it "must," "as a practical matter," put a cap on the total number of newsracks on the public right of way, Petitioner's Brief at 26 n.8, the fact remains that there is no evidence in the record that it has or intends to do so.

In contrast to the inconsequential benefits the City's selective ban on newsracks containing commercial speech can have for the City's goals, the costs of the ban are heavy, as explained above. It bears repeating that *Fox* requires more than that the City's ban satisfy a "rational basis" analysis, which requires deference to the legislative judgment whether or not the particular regulatory means chosen exacts an "inordinate" burden upon the speech regulated, so long as the regulation serves legitimate governmental goals. 492 U.S. at 480. In enacting the ban the City has failed utterly to take into account, let alone "carefully calculate," *id.*, those costs. The price the City has exacted, despite the dearth of benefit to the City in addressing design and safety problems posed by all newsracks, is the complete denial of access by Discovery Center and Harmon to the public right of way and denial of the public's concomitant right of access to these publications. Contrary to the City's assertion, this Court is not required to automatically defer to the City's judgment that its interests "can best be furthered" by the ban on Discovery Center's and Harmon's newsracks. Petitioner's Brief at 25-26. *Fox* requires a level of factual proof that the

evidence in this case cannot meet. It is simply *irrational* to attempt to cure problems associated with the non-communicative aspects of all newsracks by (a) banning only newsracks containing commercial speech and (b) failing to limit the total number of newsracks containing non-commercial speech. The court of appeals properly balanced the competing interests involved in this case in holding that the ban is unconstitutional under *Central Hudson* and *Fox*.

The City suggests that the court of appeals applied a "least restrictive means" test in analyzing whether the City's ban is "no more extensive than necessary" to serve the City's interest in addressing the aesthetics and public safety problems it asserts are caused by newsracks. Petitioner's Brief at 15. This is simply not the case. A "least restrictive means" requirement holds government regulators to one and only one method of regulation. In contrast, the court of appeals found that many other, more precise modes of regulating newsracks remain open to the City. In so holding, the court of appeals was not substituting its judgment for the City's as to which mode to choose. J. A. 54. The fact that such alternative regulatory modes were being contemplated by the City at the time of trial (albeit with respect only to newsracks containing newspapers) and have in fact been implemented for newsracks containing newspapers demonstrates that the ban is substantially broader than necessary to effectuate the City's goals. Since, as was true in this Court's decisions striking down regulations under *Central Hudson*, "far less restrictive and more precise means," *Fox*, 492 U.S. at 479 (citations omitted), exist for addressing the City's concerns with the uniformity of design and placement of newsracks, the City's ban on newsracks

containing commercial speech cannot survive the scrutiny required by this Court in *Fox*.

IV. The City's Ban Is A Content-Based Regulation That Is Not Narrowly Drawn To Address The Safety And Aesthetics-Related Problems Flowing From The Lack Of Uniformity In The Design, Placement And Alignment, And Potential Proliferation, Of Newsracks On The Public Right Of Way.

A. The ban is directed solely at commercial speech that is not disseminated in newspapers.

Commercial speech, like other categories of speech, is properly the subject of reasonable restrictions upon the time, place or manner in which it is disseminated, provided such restrictions are content-neutral. *Bates*, 433 U.S. at 384; *Virginia Pharmacy Board*, 425 U.S. at 771. The City contends, for the first time in this litigation, that its ban on newsracks containing commercial publications is content-neutral, because it "is directed solely at the esthetic and safety problems caused by newsrack-type dispensers and not at any viewpoint that the city finds objectionable" Petitioner's Brief at 31. Since the ban is "justified without reference to the content of the regulated speech," the City argues, it is consistent with the first amendment, even though it has "incidental effect[s]" solely upon commercial speech. *Id.* at 30 (citing *Renton v. Playtime Theatres*, 475 U.S. 41, 47-48 (1986) and *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This argument does not square with the City's prior arguments in this case. The City's sole justification for its ban, both in the district court and on appeal, has been its ability to draw a content-based distinction between commercial and non-commercial

speech, due to the "lesser protection" accorded the former. See e.g., Argument on Motion for Directed Verdict, J. A. 174-75. This distinction, however, is irrelevant to the interests intended to be served by the ban. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. ___, 112 S.Ct. 501, 510-11 (1991). Moreover, the City has applied Amended Regulation 38 to enforce Section 714.23 of the Cincinnati Municipal Code, which unambiguously bans only *commercial* handbills from the public right of way. Cf. *Taxpayers for Vincent*, 466 U.S. at 804 ("[T]he text of the ordinance is neutral - indeed it is silent - concerning any speaker's point of view . . .").

That the City's ban is content-based is also evidenced by the fact that the City has involved publishers of newspapers, but not "commercial" publishers such as Discovery Center and Harmon, in its ongoing development of newsrack design and placement requirements. J. A. 60, 70-71, 190-92. As the City Engineer stated, "newspapers, including their advertising content, have a special status that is essentially [inviolable]." *Id.* at 203. The City Architect's testimony is most damaging to the City's belated contention that its ban is directed *solely* to public safety and aesthetics. When asked whether it was fair to say that the City's regulatory scheme was in part a partnership with the newspapers of the City, the City Architect said, "Yes, sir. Definitely." *Id.* at 191. The result of this partnership is clear: the City's ban subsidizes publishers of commercial speech favored by the City by forcing commercial speakers to buy space in newspapers in order to have access to the public right of way. The ban "imposes a financial burden on [commercial speakers] because of the

content of their speech," and is presumptively unconstitutional. *Simon & Schuster*, 502 U.S. ___, 112 S. Ct. at 508.

- B. The ban cannot be directed at "secondary effects" peculiar to newsracks containing commercial speech, for there is no evidence of "secondary effects" distinguishing such newsracks from other newsracks.**

The City does not argue, as it cannot, that Discovery Center's and Harmon's newsracks differ from "non-commercial" newsracks in their effect upon the safety and aesthetics of the right of way. Therefore, the City's ban does not qualify as "content-neutral" on the theory that the "secondary effects" of newsracks containing commercial speech, and not the speech, are the targets of the City's ban. Cf. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (upholding ordinance affecting "adult motion picture theatres," but not "other" motion picture theatres, as content-neutral because aimed at the particular secondary effects of "adult motion picture theaters" on neighboring community). In short, nothing about Discovery Center's and Harmon's newsracks or their speech justifies disparate treatment of their newsracks. The City's ban draws a distinction among newsracks based upon the nature of the publications they contain, even though that distinction is wholly irrelevant to the problems the City seeks to address. This content-based distinction cannot support a total ban on Discovery Center's and Harmon's newsracks. Finally, the City's ban cannot pass muster as a content-based regulation of speech, for it is not narrowly drawn to address the City's concerns about the lack of uniformity among newsracks. See *Burson*

v. Freeman, ___ U.S. ___, No. 90-1056 (May 26, 1992); *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

- V. The City's Regulatory Scheme Is Unconstitutional On Its Face Because It Affords The City Unbridled Discretion To Permit Or Deny Speakers Access To The Public Right of Way Whether By Means Of A Newsrack Or Otherwise.**

It is settled law that a licensing scheme that "vests unbridled discretion in a government official over whether to permit or deny expressive activity" violates the first amendment. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1938). Such a scheme is a threat to expression because it is a classic prior restraint, *Lakewood*, 486 U.S. at 757, and because it "raises the specter of content and viewpoint censorship." *Id.* at 763. The City of Cincinnati's regulatory scheme governing the distribution of "commercial handbills" is just such a scheme.²

² Discovery Center and Harmon raised their facial challenge to the City's regulatory scheme in their complaint, J. A. 8, and in the memorandum in support of their motion for injunctive relief in the district court. Case No. C-1-90-437, Doc. #2. Neither the district court nor the court of appeals reached this issue. Discovery Center and Harmon are nevertheless entitled to renew their facial challenge as argument in support of the judgment of the court of appeals. *Washington v. Yakima Indian*

A. The City's scheme places unbridled discretion in the hands of city officials to determine whether or not a publication is a "commercial handbill."

The City's scheme suffers from several layers of constitutional infirmity. First, the foundation of the City's scheme is Section 714-23 of the Cincinnati Municipal Code, which is itself constitutionally infirm under *Virginia Pharmacy Board* because it totally bans commercial speech on the public right of way. Section 714-23 provides, in pertinent part, that no person shall

"hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful . . . for any person to hand out or distribute . . . any non-commercial handbill to any person willing to accept it [in any public place.]"

C.M.C. §714-23. Second, the City's scheme is devoid of the definitional clarity necessary to label any given publication a "commercial handbill" so as to deny it access to the public right of way, without "raising the specter" of content or viewpoint-based censorship. *Lakewood*, 486 U.S. at 763. Section 714-1-C of the Cincinnati Municipal Code defines "commercial handbill" as any written or printed matter

(Continued from previous page)

Nation, 439 U.S. 463, 476 n.20 (1979). This Court "may affirm [that judgment] on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (citation omitted). This Court has plenary power to address this argument, in view of the important first amendment rights at stake. See *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 505, 510 (1984).

- (a) Which advertises for sale any merchandise, product, commodity or thing; or
- (b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or
- (c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

C.M.C. §714-1-C. On the other hand, the Cincinnati Municipal Code defines "non-commercial handbill" as any "printed or written matter . . . newspaper, magazine, paper, [or] booklet . . . not included in the aforementioned definitions of a commercial handbill." C.M.C. §714-1-N. Section 862-1 of the Cincinnati Municipal Code grants permission to "any person . . . lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of the City streets for selling newspapers . . . [with permission of adjacent building owners or tenants]." C.M.C. §862-1. Section 911-17 of the Cincinnati Municipal Code provides that "newspapers of general circulation in the City of Cincinnati" may be sold from newsracks, subject to administrative safety regulations. C.M.C. §911-17. Finally, Amended Regulation 38 sets forth the procedures for obtaining permits to distribute "newspapers of general circulation" through newsracks, but is silent as to the standards to be employed in determining which publications come within its ambit. Neither the Cincinnati Municipal Code nor Administrative Regulations 38 or 67 define the term "newspaper." J. A. 206, 362, 375.

This lack of clarity in the City's regulatory scheme empowers City officials to grant or deny access to the public right of way on the basis of whether a publication is deemed a "commercial handbill" or a "non-commercial handbill," without meaningful guidelines or standards by which the two defined categories of speech may be distinguished. Nor is the lack of clarity in the "commercial"/"non-commercial" handbill distinction remedied by reference to the form of publication identified as a "newspaper," within the City's lexicon. It cannot be disputed that any "newspaper," as that term is commonly understood, "advertises [merchandise] for sale," and "directs attention to . . . business[es] . . . or other activi[ties]," and is thus a "commercial handbill," within the meaning of Section 714-1-C. As a result, the City's overall scheme of regulating the dissemination of speech on the public right of way poses a substantial threat of content-based censorship, whether among publications commonly thought of as "newspapers," or among publications such as Discovery Center's and Harmon's, which contain truthful commercial information about fully protected activity, or among publications falling into either category. Unlike the licensing scheme invalidated in *Lakewood*, which regulated solely the issuance of permits for users of newsracks, the City of Cincinnati's regulation of newsracks is intimately tied to its overall scheme governing the dissemination of all speech on the public right of way in any manner. The City's scheme, therefore, poses a greater threat to speech than the licensing provision held unconstitutional in *Lakewood*. 486 U.S. at 778 (White, J., dissenting). Furthermore, because the City's scheme requires the yearly renewal of newsrack licenses, J. A. at 123, it poses an added risk of censorship even upon currently licensed

speakers. *Lakewood*, 486 U.S. at 760. In the absence of criteria to direct decision-making with regard to the renewal of newsrack permits, speakers holding newsrack permits may feel constrained to tailor their speech in order to anticipate the criteria the City might apply, in order to maintain their permits.

The potential for content- or viewpoint-based censorship inherent in the City's scheme is not merely speculative. Indeed, the record in this case establishes that in developing and implementing its regulation governing newsracks the City consciously enjoys a "partnership," J. A. at 61, 191, with the City's leading daily newspapers – all arguably "commercial handbills" under Section 714-1-C – that places the City's imprimatur upon those publications (but not Discovery Center's and Harmon's) and grants them access to the public right of way, subject to newsrack design and placement guidelines equally applicable to all newsracks, regardless of the commercial content of their publications. Moreover, Discovery Center and Harmon compete with local newspapers for advertisers. In effect, the City's scheme confers an obvious and constitutionally dubious advantage upon newspapers in that competition. The content-based censorship inherent in the City's active involvement with newspapers to regulate newsracks is palpable, and underscores the unconstitutionality of the City's regulatory scheme. Cf. *Lakewood*, 486 U.S. 790 (White, J., dissenting) ("[T]here could be no allegation in this case that the Mayor's discretion to deny permits *actually* has been abused to the detriment of the newspaper") (emphasis in original); *Taxpayers for Vincent*, 466 U.S. at 804 ("[T]here is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance").

B. The City's interpretation of the term "commercial handbill" does not cure the facial infirmity of its regulatory scheme.

This Court has stated that the facial infirmity of a regulatory scheme such as the one at issue in this case may be cured where the government has adopted a narrowing construction which provides guidance to decisionmakers charged with enforcing the scheme. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (collecting cases). In the instant case, however, the fatal lack of clarity in the language of the City's regulations governing the dissemination of speech on the public right of way is not remedied by the City's *ad hoc* interpretation of the term "commercial handbill." On February 7, 1990, the Cincinnati City Manager notified members of the City Council that as of that date he would instruct the City Public Works Department to "limit approvals under Administrative Regulation 38 to daily or weekly publications primarily presenting coverage of, and commentary on, current events." Pl.Ex. 2; J. A. 229-30. That day the City Council passed a motion requiring the enforcement of Sections 714-23 and 714-1-C to bar from the public right of way newsracks from which "commercial handbills" were distributed. Pl.Ex. 8; J. A. 236; Pl.Ex. 9; J. A. 238. As a result, Discovery Center's and Harmon's newsrack permits were revoked pursuant to the City Manager's determination that their publications were "commercial handbills" because they did not "primarily" cover current events. J. A. 100-103; Pl.Ex. 8; J. A. 236; Pl.Ex. 9; J. A. 238. However, the definition of "commercial handbill" put into operation by the City Manager has not been enacted into law. J. A. at 112, 122. Therefore, there is

no notice to potential permit seekers of the City Manager's interpretation of "commercial handbill." One result of this combination of lack of clarity and lack of public notice is the likelihood that speakers who would qualify as "non-commercial handbills" because they are devoted "primarily" to editorial comment on current events would be inhibited from seeking newsrack permits, or from otherwise distributing their publications on the public right of way, because they meet the facially disqualifying criteria of Section 714-1-C.

Despite the imprecision of the criterion that a publication "primarily" cover current events in order to be considered a "non-commercial handbill," the City Engineer testified that the City has not adopted a measure of the amount of coverage or commentary on current events that would save a publication from the City's ban on "commercial handbills" on the public right of way. J. A. 111. The City Engineer was unable to state precisely which publications he would consider to be "non-commercial handbills." The City Engineer stated that he "recognize[d] that there is . . . commercial material in any of the publications that we all recognize as newspapers." *Id.* at 110. He further testified that he had "concern about publications that [were] *almost entirely or entirely commercial in nature.*" *Id.* (emphasis added). The determination whether a publication containing sixty percent advertising content was a "commercial handbill" would be made on a case-by-case basis. *Id.* at 112. A publication containing "fifty percent news versus commercial material" might be a "borderline" case. *Id.* at 111.

The City Engineer's testimony demonstrates that the City has not interpreted the term "commercial handbill" so as to cure the facial infirmities of its regulatory

scheme. City officials retain unbridled discretion to determine which publications pass muster as "non-commercial handbills," and, thus, to determine which publications may be distributed on the public right of way. Therefore, the City's scheme is not saved by any narrowing construction attributable to the decisionmaker responsible for granting or denying speakers access to the public right of way, and it must be declared unconstitutional on its face. *See Ward*, 491 U.S. at 795.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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In The
Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

vs.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

Without repeating all of the factual background in this case, Cincinnati must address one aspect of Respondents' statement of facts. Respondents note that "since the evidentiary hearing in this case, the City has twice revised its newsrack regulation." Respondents' Brief at 13. Respondents refer to administrative Regulation 67¹ in its original and revised versions.

By Respondents' own admission, these revisions are irrelevant to the present case. The constitutionality of Cincinnati's regulatory scheme at the time of the hearing may not be altered by subsequent interpretations.

However, the revisions, as Respondents know, were in response to the judicial rulings below. Cincinnati is merely attempting to comply with the existing judicial directives while this appeal is pending. Of course, as regards Respondents, there is a stay allowing the presence of Respondents' newsrack-type advertising dispensers on Cincinnati sidewalks. Other commercial publishers have filed requests in the interim to place newsrack-type advertising dispensers on public sidewalks and City officials must have guidelines to evaluate these requests. Therefore, Respondents' references to the Administrative Regulations as amended are misleading. The revisions are judicially compelled and implemented under protest. Respondents cannot now fairly argue otherwise.

¹ An Administrative Regulation is a directive from the City Manager regarding the interpretation of certain sections of the Cincinnati Municipal Code. See Article 1, Section 7 of the Cincinnati Administrative Code, Appendix 1a to Reply Brief.

SUMMARY OF ARGUMENT

Respondents arguments must fail, because all of their arguments are based upon a single incorrect premise: That Cincinnati's regulatory scheme is a ban on speech. To the contrary, Cincinnati's regulatory scheme restricts a particular physical object (a newsrack-type advertising dispenser) affixed to public sidewalks on a semi-permanent basis. The regulatory scheme is not directly aimed at speech, it is aimed at the newsrack-type dispensing device, specifically its physical presence which detracts from the safety and esthetics of the public right-of-way. To be sure, speech is affected by the scheme, but the effect is incidental.

The underinclusiveness of Cincinnati's regulatory scheme, in that it allows newsrack-type devices containing newspapers and other forms of noncommercial speech, does not alter the fact that the regulatory scheme "directly advances" Cincinnati's substantial governmental interests in the safety and esthetics of the public right-of-way. Nor does the fact that alternative methods exist which may further Cincinnati's substantial governmental interests lessen the direct impact of the present scheme. Cincinnati need not completely accomplish its goals of providing a safe and attractive right-of-way as long as those goals are furthered to some degree by the challenged regulatory scheme.

While a balancing test is utilized to decide the constitutionality of regulations restricting commercial speech, Respondents have advocated a balancing of the wrong elements. The validity of the regulatory scheme depends upon the relation it bears to the overall interests Cincinnati seeks to further, not, as Respondents would have it, the extent to which the regulation furthers Cincinnati's interests in a particular case. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989).

Furthermore, Cincinnati's regulatory scheme burdens no more speech than is necessary to further its substantial governmental interests in the safety and esthetics of the public

right-of-way. Respondents' newsrack-type dispensing devices possess a physical presence which detracts from the safety and esthetics of the public right-of-way. Each such newsrack-type dispensing device removed from the public sidewalk, therefore, increases the safety and esthetics of the right-of-way. It is the physical presence of the dispenser that is detrimental to Cincinnati's interests and that is what is regulated. Respondents remain free to deliver their message through many alternative methods. As was earlier noted, Cincinnati need not totally or substantially "achieve" its desired objective, it need only "further" or "serve" those interests.

Additionally, Cincinnati's regulatory scheme is "content-neutral." The regulations are not "justified" with regard to the content of speech. Rather, the regulations are "justified" by a desire to improve the safety and esthetics of Cincinnati's public right-of-way. The scheme is not "content-based" merely because it impacts commercial and noncommercial speech differently.

Nor does Cincinnati's regulatory scheme vest "unbridled" discretion in governmental officials over whether to permit or deny expressive activity. The limiting interpretations of the administrative regulations and city manager's memoranda, and the long-standing practices of Cincinnati's officials substantially limit Cincinnati's discretion with regard to the granting or denying of permits for newsrack-type advertising dispensers.

Finally, Cincinnati's regulatory scheme may not be facially challenged as it relates solely to commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). To the extent that the regulatory scheme may be challenged facially as it applies to noncommercial speech, Cincinnati's regulatory scheme is not substantially overbroad given the plainly legitimate scope of the statute. *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989). To the extent that such a challenge is successful, moreover, the regulatory scheme should be given a limiting construction, not wholly invalidated. *Burson v. Freeman* ___ U.S. ___, ___ n. 13, 112 S.Ct. 1846, 1857 n.13 (1992).

I. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS ON CINCINNATI'S SIDEWALKS DIRECTLY ADVANCES CINCINNATI'S INTERESTS IN THE SAFETY AND ESTHETICS OF THE PUBLIC RIGHT-OF-WAY.

Respondents argue that Cincinnati's regulatory scheme does not directly advance its substantial governmental interests in safety and esthetics because Cincinnati could alternatively establish regulations regarding design, placement, and alignment of newsrack-type dispensers. This is an incorrect reading of the third prong of the *Central Hudson* test. A regulatory scheme does not fail to satisfy the requirement that it "directly advance" substantial governmental interests simply because those interests may be advanced in other ways.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), this Court determined that San Diego's regulatory scheme prohibiting offsite billboards directly advanced San Diego's interests in safety and esthetics. This Court did not require San Diego to merely establish design, placement, or alignment restrictions, though there is little doubt that San Diego could have passed such regulations had it been so inclined. Nor did this Court require Puerto Rico to exhaust every available legislative alternative in upholding Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents in *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986). As this Court stated in *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989):

"[O]ur decisions upholding the regulation of commercial speech cannot be reconciled with a requirement of least restrictive means. In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might encourage

such gambling, but by promulgating additional speech designed to discourage it.' 478 U.S., at 344. Rather, we said that it was 'up to the legislature to decide' at that point, so long as its judgment was reasonable. *Ibid.* Similarly, in *Metromedia, Inc. v. San Diego*, 453 U.S., at 513 (plurality opinion), where we upheld San Diego's complete ban of off-site billboard advertising, we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the City's concerns for traffic safety and esthetics. It was enough to conclude that the ban was 'perhaps the only effective approach.' *Id.* at 508." *Id.* at 479.

Perhaps the best illustration of Respondents' faulty application of the third prong of the *Central Hudson* test is this Court's holding in *Metromedia* that San Diego's ordinance directly furthered the City's interest in safety and esthetics. While Respondents note the holding and attempt to distinguish it, they ignore the fact that San Diego's ordinance permitted onsite advertising. Therefore, like Cincinnati's regulatory scheme, San Diego's ordinance was clearly under-inclusive. As Respondents note, this Court stated: "it is not speculative to recognize that billboards *by their very nature, wherever located and however constructed*, can be perceived as an esthetics harm." 453 U.S. at 510 (Respondents' Brief at 25.) Yet, it is clear that under the San Diego ordinance onsite billboards would continue to detract from the safety and esthetics of San Diego's public way. However, this under-inclusiveness did not detract from the efficacy of the restriction on offsite billboards. As this Court noted:

"Whether onsite advertising is permitted or not the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." 453 U.S., at 511.

Similarly, Cincinnati's refusal to permit Respondents to place their advertising dispensers on Cincinnati's sidewalks directly furthers the City's interest in safety and esthetics. Respondents'

dispensers possess a noncommunicative physical presence that detracts from the safety and esthetics of the right-of-way. Prohibiting this presence, consequently, increases the safety and esthetics of the right-of-way. The impact of Cincinnati's regulatory scheme is therefore both direct and effective. Neither the fact that the scheme is underinclusive, nor the fact that other schemes may also further Cincinnati's interests, alters the direct and effective impact of the present regulatory scheme as applied to Discovery and Harmon.

II. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS ON CINCINNATI'S SIDEWALKS DIRECTLY ADVANCES CINCINNATI'S INTEREST IN CURBING THE PROLIFERATION OF NEWSRACK-TYPE DISPENSERS.

Respondents argue that Cincinnati's refusal to permit the presence of newsrack-type commercial handbill dispensers on its sidewalks does not directly advance Cincinnati's interest in proliferation. Respondents state: "There is no evidence that the total number of newsracks on the public right-of-way will decrease as a result of the ban." Respondents' Brief at 28. Respondents ignore, however, that Cincinnati's regulatory scheme would decrease the number of newsrack-type devices by at least sixty-two (62).² Since the number of newsracks present on Cincinnati's sidewalks are reduced by the regulatory scheme, the scheme directly furthers Cincinnati's interest in curbing proliferation.

Respondents further state:

The City essentially concedes in inefficacy of the ban in advancing its esthetics and safety concerns,

² Respondents do, however, acknowledge this later in their Brief. Respondents' Brief at 35. It should also be noted that this number consists of only Discovery's and Harmon's dispensers and does not include other commercial publications that presently occupy Cincinnati sidewalks (such as Christian Singles and CarScope) or that may seek to occupy those sidewalks in the future.

for it states that 'sidewalks will remain visually and physically cluttered by newsrack-type dispensers dispensing noncommercial forms of speech such as newspapers' despite the ban. (Citation omitted.) Whereas, in *Metromedia*, the City of San Diego's proposed ban on all offsite billboards would have, as the parties stipulated, 'eliminate(d) the outdoor advertising business in the City of San Diego'. . . . Respondents' Brief at 29.

Cincinnati has certainly not conceded that its regulatory scheme is inefficient in advancing its substantial interests. The only thing that Cincinnati concedes is that its scheme does not totally eradicate the problems to which its regulations are addressed. It has already been noted that Cincinnati need not address all safety and esthetics concerns at one time, or none at all. It should also be noted that Respondents' reference to *Metromedia* is misleading. San Diego's regulatory scheme was underinclusive, permitting the existence of onsite billboards. The effect of the ban on the "outdoor advertising business" does not alter the fact that San Diego's public ways would continue to be adversely affected by the continued presence of onsite billboards.³ There was no claim in *Metromedia* that billboards would cease to exist, as Respondents imply.

Respondents argue further that since Cincinnati has not restricted the total number of newsrack-type dispensers that may be placed on Cincinnati sidewalks, its regulatory scheme is an "ineffective" means of addressing the City's proliferation concerns." Respondents apparently seek to add a new element to the *Central Hudson* test, the "effective means" requirement. No such test appears in any of this Court's previous jurisprudence. While a regulation must directly advance a substantial governmental interest, there is certainly no requirement that the regulation be the most "effective

³ The passage cited by Respondents proves nothing more than the common sense notion that business owners who rent or own the premises upon which their businesses sit ordinarily may place a billboard or other sign upon that premises and are therefore unlikely to pay an advertising firm for that privilege.

means" of furthering governmental goals. To the contrary, as this Court noted in *Fox*:

"In sum, while we have insisted that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the harmless from the harmful, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end." *Id.* at 480.

Consequently, while the restriction upon the overall number of newsrack-type dispensers may be one "effective means" of addressing proliferation concerns, it is not required. Cincinnati's regulatory scheme, as it stands, will directly advance its concerns regarding proliferation, by reducing the number of newsrack-type dispensers by at least sixty-two (62). The present scheme may be underinclusive, but that does not render it unconstitutional under *Central Hudson*.

Furthermore, this Court should not require Cincinnati to use the most "effective means." Obviously, the most "effective" way for Cincinnati to address its concerns would be to prohibit access to Cincinnati's sidewalks for all types of publications. However, while this may be the most effective means, it is also more burdensome upon speech than the current regulatory scheme. Respondents ignore the fact that the underinclusive aspects of Cincinnati's regulatory scheme are present in deference to the greater protection and value of core political speech. A blanket prohibition would be more "effective," but it would also be substantially more burdensome upon speech. Respondents' suggestion that this Court adopt an "all or nothing" approach in this area of the law is therefore ill-advised.

Additionally, limiting the total number of newsrack-type dispensing devices at the present poses substantial problems given the current state of the law. Under *Metromedia*, awarding space to a commercial publication to the exclusion of a

noncommercial publication would be a First Amendment violation. Conversely, awarding the space to a noncommercial publication to the exclusion of a commercial publication would violate the Sixth Circuit's interpretation of the law. It has been noted that the Court of Appeals does not consider *Metromedia* binding in the Sixth Circuit. It is true, as Respondents point out, that Cincinnati has revised its Administrative Regulations to attempt to keep current with the various rulings in this case. It is also true that Cincinnati has attempted to accomplish this without violating First Amendment rights. These attempts to remain current do not alter the fact that Cincinnati's regulatory scheme as applied to Respondents' activity directly furthers all of its stated substantial governmental interests.

III. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF DISCOVERY'S AND HARMON'S NEWSRACK-TYPE ADVERTISING DISPENSERS ON CINCINNATI SIDEWALKS BURDENS NO MORE SPEECH THAN IS NECESSARY TO FURTHER CINCINNATI'S SUBSTANTIAL GOVERNMENTAL INTEREST IN THE SAFETY AND ESTHETICS OF ITS PUBLIC RIGHT-OF-WAY.

A. The validity of Cincinnati's regulatory scheme depends upon the relation it bears to the overall problems Cincinnati seeks to correct, not upon the extent to which it furthers Cincinnati's interests in a particular case.

Respondents argue that the Sixth Circuit Court of Appeals correctly engaged in a balancing test. While Cincinnati agrees that a balancing test is necessary, Cincinnati believes that the Sixth Circuit Court of Appeals balanced the wrong things. In focusing upon the effect of Cincinnati's regulation, or the degree to which Cincinnati's interests were furthered in this particular case, the Court of Appeals erred. The degree to which Cincinnati's interests are furthered, or the effect of the regulation in a particular case, is simply not the relevant inquiry. The proper focus is upon the relationship

the scheme bears to the overall problem Cincinnati seeks to correct. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). The Court of Appeals cannot have struck the proper balance, because it was balancing the wrong things.

B. Cincinnati's regulatory scheme burdens no more speech than is necessary to further its interests in the safety and esthetics of the public right-of-way.

Cincinnati has never claimed nor assumed that Respondents' advertisements themselves are not entitled to some degree of First Amendment protection. Respondents' statements to the contrary are simply false. (Respondents' Brief at 33.) In arguing that Cincinnati's regulatory scheme imposes heavy costs upon Discovery, Harmon, and the public, Respondents have greatly exaggerated the applicability and scope of the regulatory scheme.

Respondents state that "the speech at issue is not false or misleading and. . . . Discovery and Harmon promote activity that is not at odds with any governmental interest." (Respondents' Brief at 33.) That may be true, but it is also irrelevant. Cincinnati's regulatory scheme does not prohibit Discovery or Harmon from speaking or promoting activity. Rather, Cincinnati merely prohibits Discovery and Harmon from placing newsrack-type dispensers upon sidewalks in order to distribute advertising material. The dispenser's physical presence is at odds with substantial governmental interests in promoting the safety and esthetics of the public right-of-way. Both Discovery and Harmon are free to speak about their activities and promote their programs, even in the public right-of-way, as long as they do not do so through the use of these newsrack-type dispensing devices.⁴

Cincinnati does not contend that Discovery's and Harmon's *speech* is not important. However, Cincinnati is simply not, as Respondents suggest, "banning" their "speech." Cincinnati is merely trying to keep its public ways safe and

⁴ In fact, Respondents' obviously utilize other methods of communicating their messages.

attractive. Undoubtedly, in attempting to pursue these goals, Cincinnati's regulatory scheme has incidentally limited Respondents' conduct in a particular forum. But it is important to note that only one method of distribution (newsrack-type dispensing devices) in one particular forum (public sidewalks) is being restricted. Furthermore, this conduct and forum are being restricted in order to further substantial governmental goals; keeping public right-of-ways safe and attractive by reducing the physical presence of newsrack-type dispensers.

Respondents' reliance upon *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) and *Posadas* is, therefore, misplaced. In both *Linmark* and *Posadas*, the challenged regulations were directed toward protecting the public from the message conveyed by the particular speech in question. In the present case, Cincinnati is merely attempting to protect the public from the effects of the physical presence of newsrack-type dispensers on public sidewalks. The speech itself is not prohibited. Rather, only the physical presence of the dispensers upon a particular area, the public sidewalks, is prohibited. The impact upon speech is incidental, not direct, and is not directed at the speech conveyed, or any message communicated by the speech, but, rather, at one particular method and mode of distribution.

Additionally, the restriction on the method and forum burdens no more speech than is necessary to further Cincinnati's interests in a safe and attractive right-of-way. To the extent that Respondents wish to convey their message without utilizing newsrack-type dispensers they are free to do so. However, each newsrack-type dispenser excluded from Cincinnati's sidewalks furthers Cincinnati's interests in traffic safety and esthetics.

C. Any of Respondents' speech incidentally burdened by Cincinnati's narrow proscription furthers Cincinnati's substantial governmental interest.

Respondents assert that Cincinnati's regulatory scheme has "de minimus" benefits for Cincinnati. Respondents' Brief at 35-40.

Respondents claim that *Fox* holds that Cincinnati must "achieve the desired objective" in order for the regulatory scheme to be upheld. *Id.* at 37.

However, as *Fox* itself clearly states, the governmental objectives need not be totally or even substantially "achieved," rather those objectives need only be served or furthered to the extent they are addressed. 492 U.S., at 476-480. Additionally, Respondents' arguments are very similar to those made by the appellants in *Metromedia*. As this Court there stated:

It is nevertheless argued that the City denigrates its interest in traffic safety and beauty and defeats its own case by permitting onsite . . . advertising and other specified signs. Appellants question whether the distinction between onsite and offsite advertising on the same property is justifiable in terms of either esthetics or traffic safety. The ordinance permits the occupants of property to use billboards located on that property to advertise goods and services offered at that location: identical billboards, equally distracting and unattractive, that advertise goods or services available elsewhere are prohibited even if permitting the latter would not multiply the number of billboards. Despite the apparent incongruity, this argument has been rejected, at least implicitly, in all of the cases sustaining the distinction between offsite and onsite commercial advertising. (Citations omitted.) We agree with those cases and with our own decisions in (citations omitted).

In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. 453 U.S., at 510-511.

Similarly, the underinclusiveness of Cincinnati's regulatory scheme as applied to newsrack-type dispensing devices containing noncommercial publications does not alter the fact that the prohibition of dispensers containing commercial publications directly furthers Cincinnati's interests in the

safety and esthetics of its public right-of-ways. Cincinnati need not address all of its esthetics and safety concerns with the scheme. Rather, Cincinnati is free to decide that in a limited instance – distribution of noncommercial publications – its interests in safety and esthetics may partially yield.

It should also be noted that since Cincinnati's regulatory scheme is narrowly drawn, the scheme affects only speech that detracts from Cincinnati's interests. The only conduct proscribed is placing a dispenser on the sidewalk in order to distribute commercial speech. In this way, Cincinnati's regulatory scheme is vastly different from the regulations involved in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) or *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, for example, this Court noted:

In holding that advertising by attorneys may not be subject to blanket suppression, and that the advertising at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding. * * * As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S., at 771. 433 U.S., at 383-84.

In both *Virginia Pharmacy Board* and *Bates* the challenged regulations sought to ban speech in order to protect the public from the message sought to be conveyed. The impact of the message itself was the focus of the government's interest.⁵ Therefore, merely prohibiting distribution in a particular forum would have been wholly ineffective to further the government's goals.

In contrast, Cincinnati's regulatory scheme is not directed at speech. It merely prohibits the physical presence

⁵ In this regard, *Virginia Pharmacy Board* and *Bates* are similar to the regulation upheld by this Court in *Posadas*.

of a dispenser. Cincinnati is not claiming that Respondents' message will have a deleterious effect upon the public. However, Respondents' speech is not in any sense "banned." Respondents are free to otherwise convey their message. The fact that their access to one particular forum has been limited does not mean that their speech has been "banned." The speech is obviously not the focus of the regulation. Rather, the regulatory scheme prohibits only the placement of newsrack-type dispensing devices upon the public sidewalks. Further, these devices are prohibited only because their physical presence detracts from the safety and esthetics of the public right-of-way in Cincinnati. The effect of the message is not Cincinnati's concern in this case. It is the effect of the physical presence of the newsrack-type dispensers that is Cincinnati's concern, and that is what is being regulated. Cincinnati need not restrict speech further in order to have its regulatory scheme upheld.

IV. CINCINNATI'S REGULATORY SCHEME IS CONTENT NEUTRAL.

Respondents assert that Cincinnati's regulatory scheme is content based because it distinguishes between dispensers containing commercial pamphlets from those containing non-commercial speech. Respondents state: "The City's sole justification for its ban, both in the district court and on appeal, has been its ability to draw a content-based distinction between commercial and noncommercial speech due to the 'lesser protection' accorded the former. (Respondents' Brief at 40-41.) This is an inaccurate portrayal of Cincinnati's position, but it does serve to illustrate Respondents' misunderstanding of the issues involved in the present case.

Cincinnati is limiting Respondents' access to public sidewalks because their dispensers detract from the safety and esthetics of the public right-of-way. Cincinnati's desire to keep its right-of-way safe and attractive has nothing to do with the message conveyed by Respondents' pamphlets. Indeed, if the regulatory scheme were directed toward the message or viewpoint sought to be conveyed, it would be

wholly ineffective because Respondents' remain free to otherwise convey their message. The distinction between commercial speech and noncommercial speech, and the differing levels of otherwise protection afforded them, is the reason that newsracks containing newspapers are permitted to remain upon Cincinnati's sidewalks. However, this does not mean that Cincinnati's regulations are based on the distinction. The basis of the regulation is the safety and esthetics of the public right-of-way. The scheme is not "content-based" simply because it may have a different impact on commercial speech.

Respondents also argue that Cincinnati's regulatory scheme fails the "content-neutral" requirement because the secondary effects of newsrack-type dispensers containing commercial and noncommercial publications may be similar. However, in *Boos v. Barry*, 485 U.S. 312 (1988) this Court stated:

So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded (in *Renton v. Playtime Theaters, Inc.* 475 U.S. 41 (1986) that the regulation was properly analyzed as content-neutral." *Id.* at 320.

In the present case, the justification for Cincinnati's prohibition of newsrack-type advertising dispensers containing commercial pamphlets has nothing to do with the actual publications being distributed. Rather, the regulatory scheme is directed toward remedying the detrimental effects such dispensers have on Cincinnati's public right-of-way. This is evidenced by the myriad methods available to Discovery and Harmon to convey their intended message. Since the justifications have nothing to do with content, the regulatory scheme is properly analyzed as content neutral.

V. CINCINNATI'S REGULATORY SCHEME PROHIBITING THE PLACEMENT OF NEWSRACK-TYPE ADVERTISING DISPENSERS UPON PUBLIC SIDEWALKS IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. Cincinnati's regulatory scheme does not vest unbridled discretion in a governmental official over whether to permit or deny expressive activity.

When a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. This rule applies even if the face of the law might not otherwise suggest the limits imposed. Further, this Court will presume any narrowing construction or practice to which the law is fairly susceptible. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.11 (1988). Furthermore, in expounding a statute, this Court will not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 515 (1989).

Respondents claim that Cincinnati's regulatory scheme vests unbridled discretion in governmental officials because the scheme inadequately defines the terms "commercial handbill," "noncommercial handbill" and "newspaper." This lack of definitions, Respondents argue, raises the specter of content or viewpoint based censorship.

However, Mr. Young, the City Engineer, testified in his deposition, and at the trial, that in making determinations as to whether a particular publication constituted a "commercial handbill" or "noncommercial handbill" or a "newspaper" he relied upon a memorandum from the city manager dated February 7, 1990 in which Administrative Regulation 38 is interpreted. (Deposition of Thomas Young at 9; J.A. 110-111.) This memorandum directs the Public Works Department to limit approvals under Administrative Regulation No. 38 to daily or weekly publications primarily presenting coverage of, and commentary on current events. (J.A.

229-30.) Therefore, some meaningful limiting interpretations have been formulated in order to discourage potential abuse and limit discretion.⁶

Additionally, it has clearly been Cincinnati's practice to allow newspapers to distribute their messages through the use of newsrack-type dispensing devices. (J.A. 224-228, 231-235, 253-261, 386-398.) This practice should alleviate any fears regarding the application of the regulatory scheme to newspapers. While "newspaper" may not be specifically defined in the regulatory scheme, it is not such a vague term that Cincinnati's regulatory scheme is rendered facially unconstitutional solely upon the basis that the term "newspaper" is not specifically defined.

Finally, Respondents assert that Cincinnati's regulatory scheme confers an advantage upon newspapers in the competition for advertisers. This is untrue. This Court has made it abundantly clear that noncommercial speech is to be afforded deference over commercial speech. See, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 490 (1981). Cincinnati's regulatory scheme merely reflects the deference that this Court has demanded.

⁶ Furthermore, unlike the ordinance involved in *Lakewood*, Regulation 38 requires the city manager or his designee to respond to requests to place vending devices in the right-of-way with reasonable dispatch. Regulation 38 states in pertinent part:

The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the devices. Approval or denial must be determined within five business days. * * * The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection.

Also, persons wishing to place what they believe are conforming dispensers upon Cincinnati's sidewalks are afforded a hearing in front of the Sidewalks Appeal Committee. J.A. 120-121. If this administrative appeal is unsuccessful, a dissatisfied applicant can seek relief from Ohio courts under state law. Ohio Rev. Code Ann. § 2506.01 *et seq.* See, 486 U.S., at 793 n.13 (White, J., dissenting.)

B. Facial challenges are inappropriate as applied to regulatory schemes which affect only commercial speech.

As this Court stated in *Bates v. State Bar of Arizona*:

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. See, e.g. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *United States v. Raines*, 362 U.S. 17, 21 (1960); *Ashwander v. T.V.A.*, 297 U.S. 288, 347 (1936) (Brandis, J. concurring). The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. See *NAACP v. Button*, 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumers Council*, 425 U.S., at 771 n.24, there are 'commonsense differences' between commercial speech and other varieties. See also *Id.*, at 775-781 (concurring opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *Id.*, at 771-772 n.24. 433 U.S., at 380.

Since Cincinnati's regulatory scheme, both on its face and as it has been interpreted, applies only to the placement

of newsrack-type advertising dispensers on Cincinnati's sidewalks, Respondents' challenge is improper under *Bates*.

It is true that a statute which reaches both noncommercial and commercial speech may be challenged as overbroad as it applies to noncommercial speech.⁷ *Fox*, 492 U.S., at 484. However, in order to be facially invalidated the statute's overreach must be substantial, not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep. *Id.* at 485.

Respondents contend that Cincinnati's regulatory scheme is unconstitutionally overbroad because the definitions are not specific enough to give notice to potential speakers of whether their particular publications would be granted a "newsrack" permit. Respondents contend that the lack of a particular percentage of noncommercial versus commercial speech that must be contained within a particular publication in order to be granted a newsrack permit is fatal to Cincinnati's regulatory scheme. Respondents' Brief at 48-50.

However, no publications containing fifty percent (50%) advertising and fifty percent (50%) coverage of current events are seeking permission to place newspaper vending devices upon public sidewalks. Furthermore, to the extent that such publication were considered a "newspaper," it would clearly qualify for a newsrack permit under Cincinnati's regulatory scheme. To the extent that the publication contained at least fifty percent (50%) coverage of current events, it would also qualify for a newsrack permit. Certainly, if the publication contained no commercial speech, it would qualify for a newsrack permit under the scheme. Of course, even if a particular publication contained less than fifty percent (50%) coverage of current events, such publication would qualify for a newsrack permit if the noncommercial speech was "inextricably intertwined" with commercial speech.

⁷ There can be no question that the regulatory scheme, as it applies to Discovery and Harmon regulates only commercial speech. *J.A.*, 31, 139-40, 167.

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988).⁸

Moreover, assuming the existence of such hypothetical publication, Cincinnati's regulatory scheme "is not substantially overbroad." The regulatory scheme would only prevent such a publication from dispensing its message through a newsrack-type dispensing device placed upon the public sidewalk. Many other channels of communication would remain open to such a publication to deliver its message. The limited restriction upon the hypothetical publication does not constitute such substantial overbreadth so as to render Cincinnati's regulatory scheme unconstitutional.⁹

CONCLUSION

For the above reasons, Petitioner urges this Court to reverse the decisions of the Court of Appeals and the District Court and uphold Petitioner's statutory scheme as constitutional as applied and enter judgment in favor of Petitioner Cincinnati.

Respectfully submitted,

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⁸ This was not the case with the publications of Discovery and Harmon, J.A. 30.

⁹ Furthermore, these arguments are "as applied" challenges that should be made by a publication denied a newsrack permit under Cincinnati's regulatory scheme. If successful, these challenges call for a limiting construction rather than a facial invalidation. *Burson v. Freeman*, ___ U.S. ___, ___, n.13, 112 S. Ct. 1846, 1857 n.13 (1992).

APPENDIX

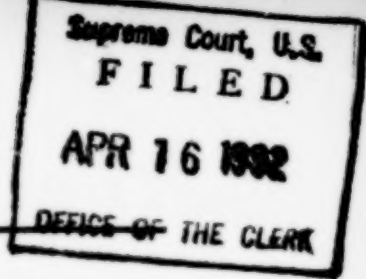
§ 7. Departmental Rules and Regulations.

The city manager may prescribe rules and regulations for the general conduct of the administration subject to the authority of the city manager. The director of each department and the administrative officer of each other office subject to the authority of the city manager may prescribe rules and regulations for the proper conduct of the department or office, but such rules or regulations shall not go into effect unless approved by the city manager. The city manager may at any time revoke, suspend or amend any such rule or regulation by whomever prescribed.

(Amended by Ord. No. 299-1979, eff. Aug. 4, 1979; repealed and reordained by Ord. No. 183-1981, eff. June 12, 1981)

3
No. 91-1200

**IN THE SUPREME COURT
OF THE UNITED STATES**



CITY OF CINCINNATI,

Petitioner,

-against-

**DISCOVERY NETWORK, INC. and HARMON
PUBLISHING CO.,**

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH
CIRCUIT**

**BRIEF OF AMICUS CURIAE
THE CITY OF NEW YORK**

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April 20, 1992

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No. 91-1200

**IN THE SUPREME COURT
OF THE UNITED STATES**

CITY OF CINCINNATI,

Petitioner,

-against-

DISCOVERY NETWORK, INC. and HARMON
PUBLISHING CO.,

Respondents.

**BRIEF OF AMICUS CURIAE
THE CITY OF NEW YORK**

INTEREST OF AMICUS CURIAE

In April 1988 the Commissioner of the New York City Department of Transportation promulgated a rule that prohibits the placement, installation or maintenance on the streets of any structure used for the purpose of distributing commercial speech. 11 Rules of the City of New York, Title 34, §2-08. The rule defines

the term commercial speech to mean written material that proposes a commercial transaction, refers to specific products or services and which is published for the purpose of promoting those products or services. If these criteria are present, the material constitutes commercial speech, notwithstanding the fact that the material may contain a discussion of public issues. §2-08, subd. a.

The efforts of the City of New York to prohibit on its streets the placement of structures used to distribute commercial speech began in 1985, when such structures first began to proliferate. At that time the City commenced judicial proceedings against The Learning Annex, Inc., a for-profit corporation offering short-term, non-accredited courses similar to those offered by respondent Discovery Network. The Learning Annex, Inc. had placed on the

streets of the City hundreds of boxes containing catalogues promoting its courses. In 1987 the New York Court of Appeals invalidated our effort on the ground that the City had failed to promulgate a rule establishing guidelines to guard against arbitrary action by City officials. City of New York v. American School Publications, Inc., 69 N.Y.2d 576, 509 N.E. 2d 311. In so doing, however, the Court of Appeals noted that the City has police power interests in the protection of the "smooth flow of pedestrian movement on its streets" and the maintenance of the "relative cleanliness of its streets." Id. at 582. The Court concluded that if the City adopted a proper rule, it could, consistent with the First Amendment, distinguish between commercial speech and noncommercial speech. It observed:

The City may ultimately choose to distinguish between

commercial and noncommercial speech if it does regulate the installation of sidewalk bins, and its choice would not in and of itself offend the 'content neutrality' requirement [of the First Amendment] (citations omitted.). Id. at 583; 509 N.E. 2d 314.

Section 2-08 of the rules of the New York City Department of Transportation represents the City's effort to comply with the opinion of the New York Court of Appeals in City of New York v. American School Publications. In the five years since that case was decided, hundreds of additional boxes dispensing commercial advertising have been placed on our streets by a variety of commercial interests. These boxes, the vast majority of which are located in the congested business districts of Manhattan, are frequently placed in or immediately adjacent to crowded cross-walks, bus stops and subway entrances. The boxes are often poorly maintained and filled with

refuse and other debris, and have become an impediment to pedestrian movement and a considerable eyesore.

In December 1989 the City of New York commenced a number of actions in the Supreme Court of the State of New York to enforce §2-08 of the Department of Transportation rules. Among the entities named as defendants were The Learning Annex, and Harmon Publishing Company, who is a respondent in the instant case. In a decision dated May 6, 1991, New York State Supreme Court Justice Alice Schlesinger declared §2-08 unconstitutional. City of New York v. The Learning Annex Inc., (Sup. Ct. N.Y. Co., Index No. 46727/89), (n.o.r.). The Court found that the City had failed to demonstrate that its interests in safety and esthetics could not be achieved by a "regulating scheme which rationally limits the number and location of

these receptacles rather than totally bans them." An appeal from this judgment is currently pending in the Appellate Division, First Department of the New York State Supreme Court.

The interests of the City of New York in the instant case are thus virtually identical to those of the petitioner. A resolution of the issues presented by this case will have a direct and immediate effect on the ability of the City of New York to continue to enforce its rule prohibiting the usurpation of our streets by those who install structures used to dispense commercial speech.

SUMMARY OF ARGUMENT

Commercial interests have no constitutionally protected right to appropriate the public sidewalks and streets by placing permanent or semi-permanent structures on them to promote their products

and services. Commercial speech is not entitled to the same degree of constitutional protection as noncommercial speech, and is subject to reasonable regulation that directly advances substantial state interests. As long as such regulation is in proportion to the interest served, it should be sustained even if it does not represent the least restrictive alternative available.

Municipalities have a substantial interest in the appearance of their streets and the safe and unimpeded flow of pedestrian movement. Since the metal boxes used to distribute commercial advertising are unsightly and interfere with pedestrian movement, it is entirely appropriate to ban them. Although the newsracks boxes used to distribute newspapers and other noncommercial speech also present esthetic and safety problems, the failure of a community to proscribe newsracks and boxes

containing such speech should not preclude it from banning structures used to dispense commercial speech. In this regard, the First Amendment does not oblige a municipality to accord commercial speech the same consideration it may accord noncommercial speech. A ban limited to structures used for the dissemination of commercial speech will nevertheless enhance the appearance of a community and improve the flow of pedestrian traffic. In light of the fact that a reasonable fit exists between the ends sought to be accomplished by the ordinance under review here and the means chosen to accomplish it, the ordinance should be upheld.

ARGUMENT

**THE ORDINANCE IN
QUESTION DIRECTLY
ADVANCES IMPORTANT
MUNICIPAL INTERESTS IN
PEDESTRIAN SAFETY AND
ESTHETICS, AND
REPRESENTS A REASONABLE
FIT BETWEEN THESE**

INTERESTS AND THE MEANS
CHOSEN TO PROTECT THEM.
IN ADDRESSING THE
PROBLEM POSED BY THE
INSTALLATION OF
NEWSRACKS AND OTHER
BOXES, A MUNICIPALITY
MAY, CONSISTENT WITH THE
FIRST AMENDMENT, CHOOSE
TO LIMIT ITS REGULATION
TO BOXES USED TO
DISTRIBUTE COMMERCIAL
SPEECH.

(1)

Over the fifteen years since its decision in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), this Court has repeatedly held that the First Amendment provides only limited protection for commercial speech. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477 (1989); Shapero v. Kentucky Bar Assn., 486 U.S. 466, 472 (1988); Posadas De Puerto Rico Associates. v. Tourism Company of Puerto Rico, 478 U.S. 328, 340-341 (1986); Zauderer v. Office of

Disciplinary Counsel, 471 U.S. 626, 637 (1985); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-456 (1978). Commercial speech may be subject to regulation that directly advances substantial government interests. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980). More recently, in Board of Trustees of the State University of New York v. Fox, supra, this Court held that the Central Hudson test does not require that government regulation be by the least restrictive means available, but requires only that such regulation be in reasonable proportion to the interest served. Id. at 479-480. For the reasons set forth below, we submit that the Cincinnati policy

meets the Central Hudson test as articulated in Fox. *

The analysis of the relevant commercial speech decisions of this Court by the Court of Appeals was incorrect. The opinion of the Court below was premised on its mistaken belief that commercial speech is entitled to the same level of protection as noncommercial speech unless it is false or misleading or "adverse effects on the community ... flow naturally from personal actions fostered by the commercial content of the speech itself." 946 F.2d 470-471. This Court has not extended such broad

* In the Court below, respondents apparently conceded that their publications constitute commercial speech. 946 F.2d, 467, n. 4. This concession was appropriate in view of the finding by the District Court that neither publication contains noncommercial speech that is inextricably intertwined with the commercial speech. See Trustees of the State University of New York v. Fox, supra 492 U.S. 469 at 474-475.

protection to commercial speech. There has never been any doubt that commercial speech which is false or misleading or otherwise deleterious to the public welfare does not enjoy First Amendment protection. See Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). However, Virginia Pharmacy Board and its successor cases hold that even commercial speech that is benign or serves a useful purpose may be subject to greater government regulation than noncommercial speech. The holding of the Sixth Circuit would invite the very dilution or leveling of the force of the First Amendment's guarantee with respect to noncommercial speech that this Court recognized in Ohrlik v. Ohio State Bar Assn., supra 436 U.S. 447, 456, should be avoided.

(2)

No commercial enterprise should have a right to appropriate for its own use a portion of the public sidewalk by installing a box to dispense advertising for its products or services. The sidewalks belong to the public and its right of free passage on them is not limited by any constitutionally protected right which would enable the respondents to engage in the activity at issue here. Cf. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 778-784 (1988) (White, J., dissenting).

The substantial interest of a municipality in the unencumbered flow of pedestrian and vehicular traffic and the appearance of its streets is beyond dispute and has been recognized by this Court on previous occasions. Members of City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805-807 (1984);

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-512 (1981). In Taxpayers for Vincent the esthetic interest was held sufficient to justify a ban on the posting of signs, including political campaign posters, on public property. Esthetics and traffic safety were held sufficient in Metromedia to warrant a content-neutral ban on outdoor advertising signs.*

The Cincinnati ordinance, like the ordinances sustained in Taxpayers for Vincent and Metromedia, advances these

* The Sixth Circuit held that Metromedia would have controlled this case but for the fact that only "a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech." 946 F.2d 470, n.9. That interpretation of Metromedia is incorrect. A majority of this Court in Metromedia recognized the right of a municipality to establish a content-neutral ban on outdoor advertising signs. 453 U.S. 490, 507-512 (plurality opinion); Id., at 541, 552-553 (Stevens, J., dissenting in part); Id. at 559-561 (Berger, C.J., dissenting); Id. at 570 (Rehnquist, J., dissenting).

important governmental concerns. Sidewalk boxes and newsracks are inherently unsightly and pose a substantial threat to the free flow of pedestrian traffic. The numbers of these structures that have appeared on the streets of our cities over the last five years has grown astronomically. Rows of weatherbeaten, rusting boxes and newsracks lined up along the sidewalks or chained in clusters around lightpoles are now a common sight. In New York City hundreds of boxes have been placed on the streets of Manhattan, in addition to the hundreds of newsracks placed on the sidewalks by newspapers and other noncommercial interests. The sidewalks of our cities are already crowded with numerous structures which singly or in combination are unsightly or obstructive, but which must be accommodated: trash cans, fire hydrants and alarm boxes, street signs, lampposts,

mailboxes and the like. There is not sufficient space to permit commercial interests to install boxes or other structures on the sidewalks, and a municipality in regulating the use of the streets must be mindful of the cumulative effect of these intrusions.

The presence of boxes used to dispense commercial advertising is a growing problem for the City of New York. The boxes found on our sidewalks are usually not well-maintained by their owners and are often dirty, rusting and bent. The boxes are frequently empty of advertising material and used by passersby as garbage receptacles. It is not uncommon for such boxes to be placed in cross-walks or to topple over, blocking pedestrian traffic. Many boxes have been abandoned by their owners and remain as eyesores long after their owners have ceased doing business.

The problems created by the presence of these boxes are not limited to Cincinnati and the City of New York. See Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325 (7th Cir., 1991). In Chicago Observer the Seventh Circuit upheld a Chicago ordinance that prohibited, inter alia, off-premises advertising attached to newsracks. The Court noted the large numbers of boxes and newsracks on the streets, and also observed that the plaintiff's boxes "contain used chewing gum and other debris more often than they contain newspapers." Id. at 326. It concluded that the City's interest in esthetics and safety justified the restriction on advertising.

In light of the fact that the boxes are inherently unsightly and pose hazards for pedestrians, it is entirely appropriate to ban them. See Metromedia, Inc. v. City of

San Diego, supra 453 U.S. 508. This Court observed in Board of Trustees of the State University of New York v. Fox, supra that the Metromedia opinion "did not inquire whether any less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics." 492 U.S. 479. (Emphasis the Court's.) In upholding the prohibition against the posting of signs on public property at issue in Taxpayers for Vincent, the majority noted that the visual blight caused by the placement of signs was "not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. 810. The Court also contrasted the posting of signs with the distribution of leaflets and handbills, noting that the latter conduct continued while the speaker or distributor remained on the scene but that

posted signs remain unattended until removed. Id. at 809.

The reasoning of the Court in Taxpayers for Vincent applies with equal force in the instant case. Like the posted signs at issue in that case, the boxes that are the medium of expression here are obviously the cause of the visual blight, and are intended to remain on the sidewalks indefinitely.

In addition to dispensing commercial advertising, advertising for the products or services is found on the boxes. In the final analysis, these boxes are nothing more than miniature billboards which have been placed on the streets to promote private commercial interests.

The Cincinnati ordinance is not invalid because it does not extend to newsracks or other boxes used for the dissemination of noncommercial speech. See

Metromedia, Inc. v. City of San Diego,
supra at 453 U.S. 510-512 (ban on offsite
advertising not invalid because ban did not
extend to onsite advertising); Members of
the City Council of the City of Los Angeles
v. Taxpayers for Vincent, supra 466 U.S.
789. Taxpayers for Vincent categorically
rejected the argument that a prohibition
against the use of unattractive signs cannot
be justified on esthetic grounds if it fails to
apply to all equally unattractive signs
wherever located. Id. at 810. A
municipality may determine, the opinion
stated, that its interest in esthetics is
outweighed by a countervailing interest that
justifies the continued use of some signs.
"Even if some visual blight remains," the
Court stated, "a partial, content-neutral ban
may nevertheless enhance the City's
appearance." Id. at 811.

The First Amendment does not require that Cincinnati accord commercial speech parity of treatment with noncommercial speech. In view of the fact that commercial speech occupies a subordinate position in the scale of First Amendment values, a municipality may allow noncommercial interests to engage in activities not permitted commercial enterprises as long as the limitation on commercial speech advances important government interests in a reasonable manner.

Like Cincinnati, the City of New York has not chosen to ban boxes containing noncommercial speech. Increased accessibility to the daily press and other noncommercial publications can be viewed as serving the public interest. This consideration, which in the view of the City of New York tipped the balance in favor of permitting the newspapers and other

periodicals to place newsracks on our sidewalks, is not present in the case of commercial advertising.*

Although all newsracks and boxes on the sidewalks are unsightly and present hazards to pedestrians, boxes used by commercial interests are particularly offensive. The vast majority of boxes used by newspapers and other noncommercial interests are coin-operated and cannot, therefore, be opened without payment of money. In contrast, boxes used to distribute advertising are not coin-operated but are either open faced or covered with a

* This Court has left open the question whether a municipality may ban entirely the placement of newspaper vending machines and newsracks on its streets. City of Lakewood v. Plain Dealer Publishing Co., supra, 486 U.S. 750, 762, n. 7 (1988). This case does not raise that issue, and the City of New York has no plans to ban newsracks dispensing noncommercial speech.

lid that may be freely opened. Consequently, as we described earlier, it has been our experience that boxes used to dispense advertising are often used as garbage receptacles by passersby. Since they are not coin-operated, the conversion of these boxes into waste receptacles is unavoidable. Rusting, filthy boxes purportedly placed on the streets to dispense advertising but unattended and overflowing with refuse are now a common sight on our streets.

As previously noted in our discussion, the New York Court of Appeals held that the First Amendment rights of commercial interests are not violated by a rule that permits noncommercial speech to be distributed by sidewalk boxes but prohibits commercial speech from being distributed in the same manner. City of New York v.

American School Publications, Inc., supra,
69 N.Y.2d 583, 509 N.E.2d 314.

The ordinance under review here meets the "reasonable fit" test established by this Court in Fox because the means chosen by Cincinnati to address the problems posed by these structures is in reasonable proportion to the societal interests served by the ordinance. The policy established by Cincinnati is no more expansive than necessary to serve its substantial interests. See, e.g., Fox, supra at 476; Central Hudson, supra at 566. No attempt is made to ban the distribution of respondents' commercial speech in that community or to censor or control its content. The ordinance does not prevent the respondents from disseminating their advertising by other means. The record of this case indicates that respondent Discovery Network distributes only 33% of its advertising

publications by means of sidewalk boxes and that Harmon Publishing Company circulates only 15% of its real estate listings by such means. 946 F.2d at 471. Most copies of respondents' advertising publications reach the public by means of direct mailing, bookstores, supermarkets, eating establishments and the like. Thus, there exist ample alternative means by which respondents can reach potential customers.

This Court has recognized that commercial speech is less likely than noncommercial speech to be inhibited by lawful regulation. Friedman v. Rogers, supra 440 U.S., 1, 10; Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977). The record here indicates that this case is no exception to the rule, and that commercial advertising will continue to flourish, notwithstanding the limited restriction placed on it by the municipality.

The Court below reasoned that since respondents owned only 62 of between 1,500 to 2,000 newsracks and boxes on the Cincinnati sidewalks, the benefit gained by their removal would be "minuscule". 946 F.2d 471. The Sixth Circuit observed that Cincinnati had available to it a variety of alternatives that would meet its concerns, including requiring boxes and newsracks to be bolted to the streets rather than chained to lightpoles, promulgating color and design limitations, or establishing a maximum number of newsracks and boxes that may be placed on the sidewalks. Id. at 472.

The reasoning of the Court of Appeals ignores both the holding in Fox that a community need not select the least restrictive means of regulating commercial speech and the Court's admonition in that case that the judicial branch should "provide the Legislative and Executive Branches

needed leeway in a field (commercial speech) 'traditionally subject to government regulation.' " 492 U.S. 481. Fox recognizes that government officials should be vested with discretion to devise reasonable and balanced solutions to problems that may be posed by commercial speech.

If the citizens of Cincinnati acting through their elected officials believe that pedestrian safety and the appearance of the streets is enhanced by this partial, content-neutral limitation on street boxes, the federal courts should defer to that judgment. The Court of Appeals inappropriately substituted its views of what is best for the community for those of its elected officials. The list of alternative solutions proposed by the Court of Appeals represents precisely the sort of judicial

second-guessing that was rejected by this
Court in Fox.

CONCLUSION

**THIS COURT SHOULD HOLD
THAT THE FIRST
AMENDMENT DOES NOT
PROHIBIT A MUNICIPALITY
FROM BANNING THE
INSTALLATION ON THE
SIDEWALKS OF BOXES USED
TO DISPENSE COMMERCIAL
SPEECH, AND THAT THE
PARTIAL,
CONTENT-NEUTRAL POLICY
ESTABLISHED BY
CINCINNATI IS IN
REASONABLE PROPORTION
TO THE INTEREST SERVED
BY IT.**

Respectfully submitted,

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7
No. 91-1200

Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF CINCINNATI,
v. *Petitioner,*

DISCOVERY NETWORK, INC., *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION; AFFILIATED
PUBLICATIONS, INC.; THE COPLEY PRESS, INC.;
DONREY MEDIA GROUP; DOW JONES & COMPANY,
INC.; GANNETT CO., INC.; LANDMARK
COMMUNICATIONS, INC.; OTTAWAY NEWSPAPERS,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1200

THE CITY OF CINCINNATI,
v. *Petitioner,*

DISCOVERY NETWORK, INC., *et al.,*
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION; AFFILIATED
PUBLICATIONS, INC.; THE COPLEY PRESS, INC.;
DONREY MEDIA GROUP; DOW JONES & COMPANY,
INC.; GANNETT CO., INC.; LANDMARK
COMMUNICATIONS, INC.; OTTAWAY NEWSPAPERS,
INC.; SEATTLE TIMES COMPANY; THOMSON
NEWSPAPERS HOLDINGS, INC.;
AND TRIBUNE COMPANY
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI CURIAE

This brief is submitted in support of Respondents Discovery Network, Inc. and Harmon Publishing Co.¹ Amici curiae represent approximately 90 percent of all daily

¹ Under Supreme Court Rule 36, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

newspapers in the United States. More than 62 million newspapers are circulated in the United States daily, and an increasing number—currently more than 16 million newspapers daily—are sold to readers who rely on single copy purchases, as opposed to home-delivered newspaper subscriptions. Nearly half of these—7.7 million—are distributed through more than 600,000 newspaper vending machines, commonly known as newsracks.

In one sense, these amici newspaper publishers are competitors for the newsrack space that was denied to Respondents by the Cincinnati ordinance at issue. However, amici have a broader interest. The nation's newspapers have a continuing commitment to preserving First Amendment protection for all forms of lawful speech, including the commercial speech of Respondents at issue here, and have often appeared before the Court to urge the broadest protection for both commercial speech and newspaper distribution.

As a result of changing lifestyles and readership habits, newsracks are an increasingly vital link between newspapers and readers. They have also become a modern-day community "bulletin board" of immediate news and information to purchasers and passers-by alike. Amici curiae therefore support Respondents' challenge to what appears to be an unnecessary ban of commercial newsracks by the City of Cincinnati.

At the same time, amici find themselves in the unfamiliar role of occupying a middle ground on constitutional issues as framed by the parties and other participants in this case. Although amici strongly disagree with those who argue that all newsracks or all "commercial publications" may be banned from public streets, they do not share the Court of Appeals' view that distribution of purely commercial speech demands the same level of First Amendment protection as daily news. Amici believe that the tension between the cities' legitimate need to manage

the public streets, on the one hand, and the public's constitutional right to use the streets for traditional First Amendment purposes, on the other, can be accommodated without resort to either extreme, under constitutional principles well established in the prior decisions of this Court. Amici respectfully urge the Court to adhere to those principles and to insist that the City of Cincinnati meet its burdens under the First Amendment before restricting Respondents' right to disseminate their publications.

INTERESTS OF THE INDIVIDUAL AMICI CURIAE

American Newspaper Publishers Association ("ANPA")² is a national trade association representing approximately 1,300 newspapers throughout the United States. Its membership constitutes approximately 90% of the nation's total daily and Sunday newspaper circulation and a substantial portion of its weekly newspaper circulation.

Affiliated Publications, Inc., through its subsidiary Globe Newspaper Company, publishes *The Boston Globe* and deploys approximately 3,000 newsracks in the Boston metropolitan area, which account for the sale of more than 14,000 newspapers daily.

The Copley Press, Inc., publishes ten daily newspapers in California and Illinois, whose combined circulation is approximately 750,000. At its largest newspaper, *The San Diego Union-Tribune*, 4,400 newsracks account for 12 percent of daily sales.

Donrey Media Group publishes 53 daily newspapers and a large number of weeklies. The Donrey newspapers have an average daily paid circulation of 804,567, approximately 94,391, or 12 percent, of which are sold through newsracks.

Dow Jones & Company, Inc., publishes the nation's largest circulation daily newspaper, *The Wall Street Jour-*

² ANPA will become the Newspaper Association of America (NAA) on June 1, 1992.

nal, which distributes more than 1.8 million copies daily. Dow Jones distributes thousands of its newspapers daily from approximately 22,500 newsracks. In Cincinnati alone, more than one quarter of its *Wall Street Journal* circulation is through newsracks.

Gannett Co., Inc., publishes 81 daily and a variety of nondaily newspapers. The total circulation of the 81 daily newspapers amounts to over 6.2 million readers, including *USA Today* and the *Cincinnati Enquirer*. *USA Today*, with an average daily circulation of over 1.9 million newspapers, sells over half a million newspapers daily from newsracks. Out of an average daily circulation of about 200,000 newspapers, the *Cincinnati Enquirer* distributes nearly 30,000 newspapers via newsracks.

Landmark Communications, Inc. and its subsidiaries publish eight daily newspapers, having a daily circulation of over 535,000 copies and a Sunday circulation of over 591,000 copies. On a daily basis, 63,476 copies are distributed by newsracks and on Sunday, the total newsrack distribution is 95,174.

Ottaway Newspapers, Inc., a wholly-owned subsidiary of amicus Dow Jones, publishes a group of 22 newspapers in 12 states, with a total average circulation of more than 565,000, and a number of non-daily publications. Newsrack sales average 120,000 copies daily and 165,000 copies on Sunday.

Seattle Times Company publishes *The Seattle Times* newspaper, with the largest combined daily and Sunday circulation in the Pacific Northwest, and also publishes two other daily newspapers and three thrice-weekly newspapers in the State of Washington.

Thomson Newspapers Holdings, Inc., with headquarters in Des Plaines, Illinois, publishes 123 daily newspapers and 41 weekly newspapers in 33 states. These newspapers are located in "small-town America," with the largest circulation being 80,000, and the majority of newspapers

falling in the 15,000 to 25,000 circulation range. Total paid daily circulation in the United States within the Thomson group is 2,257,000. Newsracks are an important distribution tool, with approximately 16,700 in use across the country, through which an average of 5.4 percent of the company's daily circulation is sold.

Tribune Company publishes the *Chicago Tribune*, *The Orlando Sentinel*, the *Fort Lauderdale Sun-Sentinel*, and four other daily newspapers, with a total daily circulation of 1,498,842. Approximately 14 percent of the *Chicago Tribune's* daily circulation of 733,775 is sold through newsracks.

SUMMARY OF ARGUMENT

The balance that must be struck between the cities' interest in aesthetics and safety of the public streets, and the public's right to receive news and information on those same streets is challenging, but the constitutional principles to be applied are clear.

The right to distribute and receive news and information, even purely commercial information, is protected under the First Amendment, and public streets are traditional public forums for distribution of news and information.

Newsracks are an essential means of newspaper distribution today, and serve a public purpose in making news and information available to purchasers and non-purchasers alike in a manner that is integral to the traditional and intended uses of public streets.

Under the First Amendment newspapers cannot be categorically banned from the public streets. However, they may be restricted under time, place, or manner and, when applicable, commercial speech regulations that meet the constitutional standards established by this Court. If scarce newsrack space must be allocated, the First Amendment permits, even encourages, preference to the traditional position of daily newspapers in the "quintessential" forum of the public streets.

ARGUMENT

I. NEWSRACK DISTRIBUTION OF NEWS AND INFORMATION IS PROTECTED UNDER THE FIRST AMENDMENT

A. Distribution of News and Information Is at the Core of the First Amendment

The First Amendment protects more than the simple freedom to speak and write; the framers of the Constitution were concerned with the unrestricted exchange of ideas and information. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 547 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Underlying the First Amendment is the concept that in order to best exercise the choices afforded by democracy, the public must have access to the widest array of information. *New York Times Co. v. Sullivan*, *supra* at 266; *Marsh v. Alabama*, 326 U.S. 501, 508 (1946); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The central role of the press in this equation has long been recognized by the Court.³ The press not only acts as a surrogate for the public in gathering and reporting news of government affairs and current events; it also informs opinion and stimulates debate essential to self-governance.⁴ Newspapers in particular—with their diverse mix of news, opinion, and analysis of matters of

³ See, e.g., *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (“[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (“[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.”).

⁴ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (the press is “one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”).

public concern—epitomize what the First Amendment was designed to protect.

The Court has also long recognized that “[t]his freedom embraces the right to distribute literature, [citation omitted] and necessarily protects the right to receive it.” *Martin v. Struthers*, 319 U.S. 141, 143 (1943). See also, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

The right of the press to disseminate information does not merely extend from the public’s right to receive it, but is guaranteed directly by the First Amendment. As the Court noted more than a century ago:

Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.

In Re Jackson, 96 U.S. 727, 733 (1878); and, more recently, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 799-800 (1978):

The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and “comprehends every sort of publication which affords a vehicle of information and opinion.”

(quoting, *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). See also, *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768 (1988) (“the circulation of newspapers . . . is constitutionally protected.”). Thus, the Court has consistently upheld the right to distribute against attempts to regulate in the interests of aesthetics or safety. See e.g., *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (municipal ordinance giving broad discretion to deny newsrack permits);⁵ *Schneider v. State*, 308 U.S.

⁵ Lower court cases decided since *Lakewood* have continued to acknowledge the importance of newsracks as a means of distribution

147 (1939) (municipal ordinance prohibiting distribution of leaflets on public streets); *Lovell v. Griffin*, 303 U.S. 444 (1938) (municipal ordinance requiring a permit to distribute literature of any kind held facially invalid).

The protected right to distribute is not diminished simply because a newspaper or publication is sold, rather than given away, or because the message is economically motivated. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

B. Public Streets Are Traditional Public Forums for Distribution of News and Information

The right of the State to restrict expressive activity is "sharply circumscribed" by the First Amendment, particularly when the activity takes place in a traditional public forum. Restrictions must be content-neutral, "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

and have protected newsracks against overly restrictive or unreasonable regulations. See, e.g., *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991); *Miami Herald Publishing Co. v. Hallandale*, 19 Med. L. Rptr. 1927 (Fla. Cir. Ct. 1992); *Multimedia Publishing Co. v. Greenville Spartanburg Airport District*, 774 F. Supp. 977 (D.S.C. 1991); *Kentucky v. Lexington-Herald Leader*, 19 Med. L. Rptr. 1966 (Ky. Dist. Ct. 1991); *Jacobsen v. Petersen*, 728 F. Supp. 1415 (D.S.D. 1990); *Phoenix Newspapers Inc. v. Tucson Airport Authority*, 16 Med. L. Rptr. 1699, *aff'd*, 922 F.2d 845 (9th Cir. 1991); *Chicago Tribune Co. v. City of Chicago*, 705 F. Supp. 1345 (N.D. Ill. 1989); *Sebago Inc. v. Alameda*, 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (Cal. Ct. App. 1989); *Chicago Newspaper Publisher's Assn. v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988); *Jacobsen v. Filler*, 15 Med. L. Rptr. 1705 (D. Ariz. 1988). But see, *Gannett Satellite Info. Network, Inc. v. Berger*, 716 F. Supp. 140 (D.N.J. 1989), *aff'd in part, rev'd in part*, 894 F.2d 61 (3rd Cir. 1990).

Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). If a public forum restriction is content-based, the State must show further that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* Traditional public forums thus occupy a "special position in terms of First Amendment protection. . . ." *United States v. Grace*, 461 U.S. 171, 180 (1983).

Public streets and parks are "quintessential" public forums, *Perry*, 460 U.S. at 45; *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *United States v. Grace*, 461 U.S. at 177, and their historical importance in the free exercise of expressive activity has long been recognized. See e.g., *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939); *Schneider v. State*, 308 U.S. at 163; *Grace*, 461 U.S. at 177. In *Hague*, for example, the Court stated that public streets and parks have:

immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Hague, 307 U.S. at 515. Distribution of newspapers on public streets and sidewalks is every bit as much a part of these traditional public forum activities and therefore must be afforded First Amendment protection:

[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. State, 308 U.S. 147, 163 (1939).

C. Newsracks Serve a Public Purpose Consistent With the Traditional and Intended Use of Public Streets

Newspapers have been distributed on American streets and sidewalks since before the Constitution.⁶ From the

⁶ See W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News*, 35-39 (1987); Whisant, "Selling the Gospel News, Or:

nineteenth century until after World War II, most cities were filled with news hawkers or "newsies" selling newspapers on the streets and sidewalks—outside banks, stores, government buildings, in front of subway, bus and train stations—wherever pedestrian traffic was present.⁷ An historian describing this era noted that "the newsies shouting the headlines were as much a part of the urban street scene as the lampposts on every corner."⁸

Even prior to the colorful era of the "newsies," in the early 1800's newspaper publishers displayed news bulletins on boards nailed to their office doors, for passers-by in the streets to stop and read. This tradition of news posting, and this public "bulletin board," became an important part of American news dissemination.⁹

Modern-day newsracks are the contemporary evolution and combination of the "newsies" and the public bulletin board. Newsracks evolved from the enterprise of news hawkers who slung bags of newspapers on lampposts, with "trust" pouches for the coins of buyers. Today, it is newsracks that "sell" millions of daily newspapers to the public as they pass through the streets, and serve as a bulletin board to millions more who stop to "catch up on the news" and read the headlines through the display windows of the newsracks.¹⁰

Amici curiae U.S. Conference of Mayors argue that allowing newsracks on public streets and sidewalks condones a private use of public property that is somehow inconsistent with the "intended use" of the public streets. See Brief of U.S. Conference of Mayors at 7. The

The Strange Career of Jimmy Brown the Newsboy," 5 *J. Soc. Hist.* 269, 273 (1972); F. Mott, *American Journalism: A History 1690-1960* 106 (3d ed. 1967).

⁷ D. Nasaw, *Children of the City* 78-79 (1985).

⁸ D. Nasaw, *supra* note 7, at 78.

⁹ J. Lee, *History of American Journalism* 159 (rev. ed. 1923).

¹⁰ A. Lee, *The Daily Newspaper in America: The Evolution of a Social Instrument*, 299-300 (1973).

argument fails on two counts: first, as shown above, newsracks serve a public purpose entirely consistent with the traditional and intended use of the streets; and second, the placement of newsracks on sidewalks is simply not a private "taking" of public property.

Newsrack operators claim no title to public property. The existence of newsracks does not diminish the public's right to use the streets and sidewalks, nor is it inconsistent with that use. Instead, as discussed above, the availability of newspapers is an integral part of the traditional patterns of public use of the streets. Where it can be shown that newsracks significantly interfere with the public's use of the streets, they can be, and are, regulated to alleviate the particular problem. Newsracks are not permanent structures; they can be moved and are subject to regulation of their size, design, and placement, if necessary.¹¹

D. Newsracks Are an Essential Means of Newspaper Distribution Today

Changing demographics and the news habits of modern society have greatly increased the importance of single-copy sales of newspapers and encouraged the development of modern-day newsracks. Newsracks have replaced not only the familiar city news hawkers, they are increasingly replacing the traditional clapboard-sided newsstands that are disappearing in American cities.¹² Unlike most newsstands and retail stores, which close at night, newsracks remain an effective vehicle to showcase the news and efficiently distribute the newspaper to passers-by around the clock.

Just as the development of motorized transportation revolutionized the distribution of newspapers early in the century and led to the current dominance of home-delivered circulation, changing patterns in public demand have made the availability of single-copy newspaper pur-

¹¹ See discussion at pp. 22-28, *infra*.

¹² C. Rambo, "Single-Copy Sales," *Presstime* 6 (July, 1984).

chase, and thus newsracks, increasingly important. Currently, more than 62 million daily newspapers circulate each weekday. Of that number, over 16 million are distributed by single-copy sales through newsracks, newsstands or stores, with 7.7 million (46%) of single-copy sales coming from newsracks.¹³ Developed in its present form more than 35 years ago,¹⁴ newsrack circulation has continued to increase sharply nationwide. For example, while newsracks accounted for only 19% of daily single-copy sales in 1982, the portion had grown to 46% by 1991.¹⁵

This growth in newsrack distribution is attributable to several factors. First, there are many readers who either do not have access to home delivery of a particular newspaper or who choose not to receive home delivery for reasons of flexibility, convenience, or expense.¹⁶ Second, with the variety of newspapers available today,¹⁷ many readers who subscribe to one newspaper are also reading

¹³ See International Circulation Managers Association, "Single-Copy Sales Become Larger Piece of Sales and Revenue Pie," *ICMA Update* 1-2 (June, 1991).

¹⁴ M. Graczyk, "It's the 30th Birthday of Coin-operated Newsracks," *Presstime* 32 (Feb., 1987).

¹⁵ See Newspaper Advertising Bureau, Inc., *Research Report: Circulation and Home Delivery Patterns* 37 (Nov., 1983); Newspaper Advertising Bureau, Inc., *Home Delivery and Single Copy Buying: Results From a National Survey* 41-55 (1988); International Circulation Managers Association, "Single-Copy Sales Become Larger Piece of Sales and Revenue Pie," *ICMA Update* 2 (June, 1991).

¹⁶ Daily home delivery falls below the 50% mark for a number of demographic groups, including those with family incomes below \$10,000, the unmarried, renters, and those under 30. See Newspaper Advertising Bureau, Inc., *Research Report: Circulation and Home Delivery Patterns* 5-6 (Nov., 1983).

¹⁷ Readers typically have a choice between: a metropolitan newspaper, published in major cities; a national newspaper such as *The Wall Street Journal*, *USA Today*, or the *New York Times*; a suburban or local newspaper focussed on readers' local communities; or specialty newspapers geared towards specialized interests.

a second, to get another point of view or coverage of specific areas of interest. Typically, this second newspaper is purchased directly, by single copy, rather than by subscription. Third, reading habits have changed. Most urban commuters, for example, seem to prefer buying their newspaper at work or on the way to or from work. Young adults forego home delivery in favor of the flexibility of choosing when to read the paper and which newspaper to read.¹⁸ Still other readers buy newspapers only when newsworthy events or headlines draw their attention.¹⁹ Together, these various groups have created increased demand for single copy availability of newspapers and the convenience of newsracks as a source of distribution.

No fungible substitutes exist for newsracks today. They make newspapers readily available to those who are most likely to purchase them on a single copy basis. No other distribution outlet is as efficient in meeting the demands of the public.²⁰ As noted, the familiar newsstands of the

¹⁸ W. Thorn & M. Pfeil, *Newspaper Circulation: Marketing the News* 271-72 (1987); C. Rambo, "Single Copy Sales," *Presstime* 6 (July, 1984).

¹⁹ But single-copy purchasers are habitual newspaper readers. Studies show that seven of ten single-copy readers purchase at least one newspaper every day. See C. Rambo, "Single-Copy Sales," *Presstime* 6 (July, 1984). Many of these readers choose to buy the newspapers on the street even though they live in areas regularly served by home delivery dealers. See Newspaper Advertising Bureau, Inc. *Research Note: The Marketing Value of Single-copy Buyers* 9-10 (Oct., 1988). Ruth Clark, President of an Englewood Cliffs, New Jersey research firm, was quoted in *Creative Marketing Strategies* as saying:

[Newspapers] are the last home-delivered product in America. Gone is the . . . milkman, even the Avon lady . . . Like it or not, the single-copy purchaser is here to stay and is going to increase in numbers.

American Newspaper Publishers Association, *Creative Marketing Strategies* 1 (Oct., 1986).

²⁰ The Court itself has recognized the "effectiveness of the newsrack as a means of distribution." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. at 762 (1988).

past are a disappearing breed.²¹ While grocery and convenience stores sell significant numbers of single-copy newspapers, many are closed for substantial parts of the day, and their population is declining in the typical urban core. The combined newsstand and store sale dominance of single-copy sales (81% in 1984) had dropped to 54% in 1991, with newsracks increasing as a source from 19% to 46% in the same period.²²

In addition, many retail outlets have limited shelf and floor space for newspapers (typically not readily viewable by passers-by), which means that only selected newspapers will be carried. Out-of-town newspapers, newspapers offering a contrasting viewpoint, or newspapers that are not generally popular, risk being excluded.²³

As discussed above, 26.87% of American newspaper buyers currently rely on single-copy sales of newspapers, and newsracks are currently the means by which almost half of those buyers acquire their newspapers. The proportion is rising, and no other available distribution method can accommodate the increasing demands of the public for single-copy newspaper purchase as effectively.

E. A Categorical Ban of Newsracks From Public Streets Is Impermissible Under the First Amendment

Banning newsracks from public streets would effectively prohibit the distribution of newspapers in many urban areas. To say that newsracks are the modern equivalent of the historic newsboy or newsstand is not merely a metaphor; changes in labor laws and demographics have made distribution by newsboys or newsstands all but impossible in many urban areas, and newsracks are often

²¹ C. Rambo, "Single-Copy Sales," *Presstime* 6 (July, 1984).

²² See note 15, *supra*.

²³ See *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1470 (N.D. Ill. 1988) (private sellers not an adequate alternative to newsrack distribution because availability subject to sellers' discretion is too transitory).

the most efficient way to meet the public's ever-increasing demand for single-copy newspaper purchase in urban centers. The protected right of general circulation has never been doubted, yet this right would be rendered meaningless in many areas if newsracks were banned in disregard of the reality of modern day demographics and readership demand.

The need to assess the existence of *realistic* alternative means of distribution has been recognized by the Court. See, e.g., *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977), (although in theory sellers of homes were free to employ alternatives to lawn signs, in practice the alternatives were not satisfactory). In order to fulfill its task of assessing the First Amendment interests at stake and weighing them against the public interest alleged, the Court must carefully examine the effect a ban would have on communication. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503 (1981).²⁴

In the case of newsracks, a substantial limitation would foreclose the means by which millions of Americans buy newspapers each day. The overwhelming public demand for single-copy purchase of newspapers has increased rapidly in the past decade and is uniformly projected to increase in the future. For this reason alone, the Court should not accept the simplistic invitation of the amici cities²⁵ to declare constitutional a hypothetical ban on all newsracks, without a fully developed record involving careful consideration of the impact on traditional daily newspaper distribution across the country.

²⁴ In *Metromedia*, with respect to billboards, the Court stated that a court must assess the First Amendment interest at stake and weigh it against the public interest allegedly served by the regulation. The Court noted that "[p]erformance of this task requires a particularized inquiry into the nature of the conflicting interests at stake here, beginning with a precise appraisal of the character of the ordinance as it affects communication." *Metromedia*, 453 U.S. at 502-503.

²⁵ Brief of U.S. Conference of Mayors, at 12-14.

The amici cities cite several cases to support their proposal that newsracks can be banned from the public streets, but these cases involved circumstances that are distinctly different from those before the Court, and none address the role of newspapers in the public forum.²⁶

The cities also rely on *City Council v. Taxpayers For Vincent*, 466 U.S. 789 (1984), *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), and on the dissenting opinion in *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988) (White, J., dissenting). While these opinions are closer to this case, in that they at least deal with the same general subject matter, the cities' reliance on them in support of a total ban of newsracks is misdirected.

²⁶ Amici cite *Adderly v. Florida*, 385 U.S. 39, 47 (1966), for the generally accurate proposition that the government has the power to preserve the property under its control for the use to which it is lawfully dedicated. However, *Adderly* addressed the asserted right to demonstrate on the secured and non-public premises of a county jail—clearly not intended for the interchange of ideas but for security purposes. Similarly, amici cite *Pell v. Procunier*, 417 U.S. 817, 833-834 (1974), which concerned whether the state was required to allow face-to-face interviews between state prison inmates and the press, even though such interviews were not available to the general public.

Amici also cite *Breard v. Alexandria*, 341 U.S. 622, 642 (1951), for its statement that the First Amendment "does not mean one can talk or distribute where, when and how one chooses." *Breard*, however, concerned a city ordinance prohibiting peddlers and canvassers from soliciting from the occupants of private residences. Equally inapplicable to the present case is *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983), where the Court held only that Congress' decision not to subsidize a lobbying group with public funds did not violate the First Amendment. Finally, both *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) and *United States v. Kokinda*, 497 U.S. —, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) are cited by amici for the proposition that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Greenburgh*, 453 U.S. at 129. However, *Greenburgh* and *Kokinda* involved, respectively, access to non-public postal letter boxes, and solicitation on the sidewalks adjoining post offices. In both cases the forums were held to be *nonpublic*.

The Court's decision in *Metromedia* involved billboards on private property, a different medium of expression in a different forum. As the Court has stated, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). In *Metromedia* the Court noted that billboards are "large, immobile, and permanent structure[s]," and they create "a unique set of problems. . . ." *Metromedia*, 453 U.S. at 502.

In his dissenting opinion in *Metromedia*, Chief Justice Burger, although willing to ban billboards, recognized constitutional differences between media:

The uniqueness of the medium, the availability of alternative means of communication, and the public interest the regulation serves are important factors to be weighed; and the balance very well may shift when attention is turned from one medium to another.

Metromedia, 453 U.S. at 557-558 (Burger, C.J., dissenting). Noting newspapers in particular, he concluded that "[r]egulating newspapers . . . is vastly different from regulating billboards." *Id.* at 558. Thus, while even a total ban of billboards may have been considered by the Court in *Metromedia*, it is neither necessary nor appropriate with respect to newsracks. In simple terms, *Metromedia* did not involve a traditional historic use of the public forum.

Similarly, in *Taxpayers for Vincent* the utility poles at issue were held not to be public-forums, and the Court specifically noted that the public forum doctrine did not apply. *Vincent*, 466 U.S. at 814. The Court held that the appellees had failed to demonstrate the existence of a "traditional right of access" to such items as utility poles for the purpose of communication. *Id.* The Court further stated that the posting of political posters on public property was not "a uniquely valuable or important mode of communication. . . ." *Id.* at 812. Moreover, the use of

the utility poles as a means to communicate was held to be inconsistent with the functional use of utility poles. In contrast, newspapers historically have been considered both a unique and valuable mode of communication in public streets, fully consistent and historically intertwined with the purposes of these traditional public forums.

It should also be noted that while the Court in *Vincent* upheld the ordinance, it recognized the importance of carefully assessing the adequacy of alternative modes of communication: "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Id.* The Court stated that there were no findings indicating that appellees' ability to communicate effectively was being threatened by "ever-increasing restrictions on expression." *Id.* The Court also found that adequate alternative channels of communication were available. *Vincent*, 466 U.S. at 815. *Vincent* thus upheld a ban in circumstances wholly different from those in the present case.

The cities' reliance on the dissenting opinion in *Lakewood* is also misguided. In a narrow ruling, the Court in *Lakewood* recognized the importance of newspaper distribution and struck down an ordinance giving the mayor broad discretion to deny permits for newsracks. *Lakewood*, 486 U.S. at 772. The dissent in *Lakewood* focussed primarily on the procedural issue of whether a facial challenge to the newsrack ordinance in question was proper. The constitutionality of an outright ban on newsracks was expressly *not* addressed by the Court. 486 U.S. at 773 (White, J., dissenting.)

In addition, the dissenting argument relied heavily on the "ample alternative channels" available for distributing newspapers in Lakewood, including the district court's finding that no person in Lakewood lived more than a quarter-mile from a twenty-four hour newspaper outlet. *Id.* at 783. In fact, the dissent concluded that the newsracks at issue would not affect the newspaper's circula-

tion in Lakewood by more than one or two percent. *Id.* at 792. Thus, the analysis of the dissenting Justices in *Lakewood* should be set in, and limited to, the appropriate context: their opinion was based on a specific factual record that cannot be generalized to support a ban of newsracks in other contexts. While the dissenting Justices might have believed that alternatives to newsracks were available in the suburb of Lakewood, the same is not necessarily true in other suburban settings, and it is certainly not true in the urban centers of America. Any observations and conclusions drawn from the circumstances and opinions in *Lakewood* should therefore be applied with great caution to this or any other case.

Despite the cities' attempts to prove otherwise, the fact remains that newsracks serve a traditional role on the public streets. As the modern successor to the news hawkers on the streets of the past, newsracks disseminate the facts and opinions that inform and encourage debate on matters of public concern. Newsracks on the public streets are a critical part of this most traditional public forum. As such, they may be regulated only in a manner that is consistent with the communicative purposes of public forums in general, and with the traditional nature of streets and sidewalks in particular. See *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985); *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

II. RESTRICTIONS ON DISTRIBUTION OF COMMERCIAL SPEECH BY NEWSRACKS MUST BE CONSISTENT WITH THE FIRST AMENDMENT

A. Distribution of Commercial Speech Serves Important First Amendment Values

The City of Cincinnati attempts to draw a bright line between "non-commercial" and "commercial" speech and bans the latter from the public street. This rigid definitional approach is reminiscent of *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In fact, the Cincinnati ordi-

nance at issue is substantially identical to the New York ordinance upheld in *Valentine*, both banning distribution or "throwing" of commercial "handbills" in public places. See *Valentine*, 316 U.S. at 53 n.1. Although the justification for such a ban is now described in terms of "aesthetics," there is very little difference between the City's position today and the conclusory rationale of the *Valentine* Court fifty years ago:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.*

316 U.S. 52, 54 (1942) (emphasis added).

This Court has since rejected as "simplistic" the notion that speech may be denied First Amendment protection solely because it is "commercial speech." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976). Even before *Virginia State Board*, the statement in *Valentine* itself was characterized by members of the Court as "casual, almost offhand," and one "of doubtful validity" that "has not survived reflection." *Id.* at 759 n.16. See *Bigelow v. Virginia*, 421 U.S. 809, 820 n.6 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

Distribution of commercial information serves important social values protected by the First Amendment. As the Court noted in *Virginia State Board*, 425 U.S. at 763, 765:

As to the particular consumer's interest in the free flow of commercial information, that interest

may be as keen, if not keener by far, than his interest in the day's most urgent political debate.

....

[A]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted.] And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Obviously, not all commercial speech carries such weighty implications, but even a cursory review of the commercial speech cases that have reached this Court indicates the strong public interest in subject matter that may be characterized as "commercial". See, e.g., *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990), *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) and *Carey v. Population Services International*, 431 U.S. 678 (1977) (birth control information); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion clinic services); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (public utility services); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (real estate advertising—racial "blockbusting"); *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, su-

pra (prescription drug prices). These commercial topics are certainly more important to readers than the non-commercial fully-protected "news" that appears in some grocery store tabloid publications.

Clearly, commercial speech is a valuable component of the marketplace of ideas and is entitled to protection under the First Amendment. The degree of protection does, and should, vary according to the purpose and circumstances of the speech, but it is clear, at very least, that the value of even purely commercial speech cannot be dismissed solely on the basis of the generalized label "commercial," which is exactly what the Cincinnati ordinance would do.

B. Under Any Test, Restrictions on Distribution of Commercial Speech Must Be Weighed Against First Amendment Burdens

All parties below apparently agreed that the City's attempted ban on commercial newsracks must meet the four-part test set out by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). Assuming (1) lawful commercial speech, the remainder of the test requires that the proposed restriction (2) promote a substantial governmental interest; (3) directly advance that interest; and (4) be no more extensive than is necessary to serve the substantial governmental interest.

The Court refined its interpretation of the fourth part of the test in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), expressly rejecting the interpretation that government must adopt the "least restrictive means" in order to pass the *Central Hudson* test. Instead, the Court sought a "reasonable fit" between the substantial interests to be served and the restrictions imposed. In the words of the Court, a "reasonable fit" is:

[one] that represents not necessarily the single best disposition, but one whose scope is "in proportion to

the interest served". . . . Here we require the government goal to be substantial, and the cost to be carefully calculated.

Fox, 492 U.S. at 480 (quoting *In Re R.M.J.*, 455 U.S. 191, 203 (1982)).

Even with these refinements, reasonable minds may differ over interpretation of the test itself, and certainly over its application to the Cincinnati commercial newsrack ban. The City claims that it satisfies the test by banning "no more speech than is necessary" to serve aesthetic and public safety goals. The Court of Appeals, on the other hand, found no "reasonable fit" where the City could have addressed these goals without banning the Respondents' use of newsracks.

Amici will leave to the parties the argument of whether the City's record in this case is sufficient to meet the requirements of *Central Hudson*. What is more important in the long run is that this Court insist on careful scrutiny of the facts and application of the test by the lower courts.

The City and other amici argue from language in *Fox* and *Metromedia* that cities' judgment in these matters should be given great deference and that "we [should] leave it to the governmental decision makers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. These arguments lose sight of the fact that the tests in *Central Hudson*, *Fox*, and other commercial speech decisions of this Court are constitutional standards which define the limits of regulation of speech and speech-related activities. As Justice Stevens observed in *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 108 (1990), it is the unavoidable responsibility of the courts to review legislative activity in this arena.²⁷

²⁷ Responding to Justice O'Connor's view that "we should be more deferential" to the State, Justice Stevens observed: "Whether the inherent character of a statement places it beyond the protection

The facts below emphasize the need for searching judicial review of these determinations. According to the Findings in the District Court, Respondents' appeals from the revocation of their newsrack permits were heard by the City Engineer, the Assistant City Solicitor, and the Director of Public Works, all persons who had participated directly in the original decision to revoke the permits. Moreover, governmental determinations under the ordinance on which they relied required no expertise in matters of public safety or aesthetics and no special familiarity with matters particular to the City of Cincinnati—in short, nothing to which any court need defer, except under the most mechanistic standard of deference. It was an outdated anti-litter ordinance that simply banned distribution of commercial handbills. Under such circumstances, there is particular need for objective application of constitutional standards by the courts, if the test in *Central Hudson* is to have any meaning at all.

The Court of Appeals below was correct in its reading of *Fox* to require careful weighing of speech values against the benefits of asserted regulation:

We presume that the cost referred to by the *Fox* Court is that which would accrue because of the burden placed on the commercial speech, and that the *Fox* test requires that such costs must be outweighed by the benefits of the asserted regulation.

Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464, 468 (6th Cir. 1991). Although the newspaper amici may not agree with the exact weight the Court of Appeals assigns to commercial speech in the present context, there is no question that *Central Hudson* and *Fox* both require careful First Amendment consideration of the burdens of any governmental restriction on speech, and that it is the courts, and not the regulators, who ultimately must determine the proper constitutional balance.

of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review." *Peel*, 496 U.S. at 108.

In the present case it seems obvious that Respondents' publications were banned from the Cincinnati streets because they were simply pigeonholed as "commercial handbills" under the ordinance. There was no apparent consideration given to alternatives under *Central Hudson*, *Fox*, or any other variation of the commercial speech doctrine recognized by this Court.

C. In Allocating Newsstand Space, Cities May, Consistent With the First Amendment, Give Preference to Daily Newspapers

Although the City speaks in terms of aesthetics and safety, and struggles to spell out an after-the-fact rationalization under *Central Hudson*, its underlying concern is obviously one of numbers. Indeed, if safety and aesthetics were the real concerns, the Court of Appeals' suggested regulatory alternatives to a total ban would be more than adequate to protect the City's interests. It is instead an underlying fear of too many newsracks crowding the street corners that leads the amici cities to urge a total ban on all newsracks:

The City has a legitimate concern that if dispensers of the kind used by respondents are allowed to remain in place they will soon proliferate to the point where they will cause major adverse effects on the City's appearance and on the free and safe flow of pedestrian and vehicular traffic. . . . [R]espondents are only two of a virtually unlimited number of potential publishers of commercial handbills.

Brief of U.S. Conference of Mayors at 21.

Certainly, if this spontaneous proliferation of newsracks were to materialize, the cities' concerns about safety and aesthetics might be well founded. But the cities' insistence on the constitutional right to ban all newsracks on public property as a solution to these prospective fears ignores the wide range of time, place, and manner regulations constitutionally available to the cities. More fundamentally, it overlooks the fact that the "property"—the public

street—was used as a public forum for dissemination of opinion, information, and newspapers long before the flow of vehicular traffic was a governmental concern.

The cities would agree, in fact they argue in their brief, that “preserving public property for its intended use” is a “substantial governmental interest”. Brief of U.S. Conference of Mayors at 7. It should therefore be clear that one thing government *cannot* do in the interest of “protecting the public’s property” is prevent the intended use of the public streets as a traditional public forum and source for news and information.

If the space available for newsracks is or becomes truly limited, cities will have to decide how and by whom the limited space is to be used, and this admittedly may raise its own constitutional dilemmas. On the one hand, the allocation criteria must be content neutral under *Lakewood*. See 486 U.S. at 760 (“the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint. . .”). On the other hand, the City is probably correct in its rejection of the Court of Appeals’ totally random first-come first-served or auction approaches. See Brief of Petitioner at 26.

However, the answer is not, as the City here has done, to engraft an obsolete (and probably unconstitutional) prohibition against commercial handbills onto its “law of newsracks.” As the record strongly suggests, this is hardly a comprehensive or practical solution if it affects less than five percent of the city’s newsracks. It also fails to take into account publications that “do more than propose a commercial transaction”²⁸ and thus cannot be so easily dismissed as merely “commercial.”

²⁸ See, e.g., *City of New York v. Learning Annex, Inc.*, 150 Misc.2d 791, 571 N.Y.S.2d 380 (N.Y. Sup. Ct. 1991), which raises legitimate questions as to whether Respondents’ publication should even have been classified as “commercial” in the first place.

The newspaper amici submit that the answer lies in careful application of time, place, and manner regulation, which permits reasonable restrictions:

[P]rovided the restrictions “are justified without regard to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). These and other recent decisions of this Court suggest that well-justified preferences among categories of publications are possible, if not exercised for the purpose of suppressing or favoring particular views. See *Ward*, 491 U.S. at 791; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986); *Clark*, 468 U.S. at 295; *Leathers v. Medlock*, 499 U.S. —, 111 S.Ct. —, 113 L.Ed.2d 494, 503 (1991).²⁹

The actual need for restrictions and their scope—i.e., whether they are “narrowly tailored to serve a significant governmental interest”—should be determined on a fact-specific, case-by-case basis subject to judicial review, as discussed at p. 23 *supra*. However, if a city can satisfy these constitutional thresholds, the First Amendment does not require that allocation of scarce newsrack space be turned into a random lottery, with no regard for the

²⁹ There is an intuitive logic to the theory that distinguishing among different categories of speech (e.g., commercial speech) may still be “content-neutral” and is not the same as discriminating on the basis of viewpoints. However, there is also great potential for abuse of such a standard and a need for judicial vigilance, to insure that prohibited suppression of viewpoints is not disguised as mere distinctions among categories. See also Justice Kennedy’s caution against applying mechanical balancing rules to test clearly impermissible content regulation, in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. —, 112 S.Ct. 501, 116 L.Ed.2d 476, 492 (1991) (Kennedy, J., concurring).

needs and interests of the reading public, or the newspapers' central role in this traditional public forum.

The final and most critical point for analysis of time, place, and manner regulation is whether there are "ample alternative channels for communication of the information," which requires a "particularized inquiry" into the nature of the forum, *see Metromedia*, 453 U.S. at 503, and carries with it the corollary that the alternatives must be reasonably effective. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977).

When this test is applied to restrictions on newsracks, it is obvious that daily newspapers occupy a unique position. Not only is the public street the traditional forum for dissemination of news of the day, but there is no effective alternative forum that provides the immediacy and mass communication that are the hallmarks of daily newspapers. Virtually all other types of publications, including those of Respondents, have other effective means to reach their respective audiences, but the public increasingly relies, and is entitled to rely, on the newsrack as the most immediate and effective source of daily news, the linchpin between public events and public debate.³⁰

To summarize, amici submit that the answer is neither to rescind all First Amendment protection for commercial speech, as the Cincinnati ordinance would do; nor is it to categorically ban newsracks from the public streets, as the amici cities urge. Both extremes would be unconstitutional. The First Amendment, history, and common sense all point to the same solution—if newsrack space is limited, cities may, indeed should, give preference to continued use of the public ways for effective distribution of daily news.

³⁰ A similar distinction was suggested by Justice Kennedy in his concurrence in *Kokinda*, *supra*, 111 L.Ed.2d at 589. Discussing the time, place, and manner test set forth in *Ward*, *supra*, he observed that, at least in a non-public forum such as post office facilities, the First Amendment permits lower protection for in-person solicitation of funds than for expressive activities.

CONCLUSION

The Court has consistently recognized the difficult but essential balance between constitutional protection of speech and press, on the one hand, and legitimate regulatory concerns, on the other. Amici curiae respectfully submit that in the present case, the balance should be struck in favor of the widest availability of information, both commercial and non-commercial. But whatever else cities may appropriately do to accommodate the goals of aesthetics and public safety, they must recognize and preserve the historic use of the public streets as a public forum for distribution of the news of the day.

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No. 91-1200

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

THE CITY OF CINCINNATI,
Petitioner,
v.

DISCOVERY NETWORK, INC., et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

**BRIEF AMICUS CURIAE OF
LEARNING RESOURCES NETWORK
IN SUPPORT OF RESPONDENTS**

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BRIEF AMICUS CURIAE OF
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INTEREST OF AMICUS CURIAE

Learning Resources Network ("LERN") is an association of providers of adult and continuing education.¹ Founded in 1974, LERN is comprised of approximately 5,000 public and private educational organizations, approximately 1,200 of which are non-profit educational institutions with organizational memberships. LERN's members include state universities, private colleges,

¹ This brief is filed pursuant to Rule 37.3 of the Rules of this Court, accompanied by the written consent of all parties.

community colleges, public elementary and secondary schools, hospitals, museums, city and county recreation departments, and churches, as well as private for-profit education program providers.²

² The breadth and geographic diversity of LERN members is reflected by LERN's board of directors:

President-Elect	President
Dr. Richard T. Walsh	Greg Marsello
R.T. Walsh & Associates	Imperial Pearl Co.
Wallingford, Pennsylvania	Providence, Rhode Island
Greg Spears, Dean	D. Searcy, Director
Community Education	Covington Campus
Camosun College	Northern Kentucky University
Victoria, British Columbia	Covington, Kentucky
Dr. Grace Smith, President	Sandra Geisinger
Smith Associates, Inc.	Schenectady, New York
Troy, Michigan	LaNeta L. Carlock, Director
Francis Chiaramonte, Dean	Westside School
Continuing Education	Community Education Center
Hartford Community College	Omaha, Nebraska
Hartford, Connecticut	Willie J. Richardson, Jr.
Ken Cicora	Delta College
Ft. Lauderdale Parks	University Center, Michigan
and Recreation	Hugh B. Hammett
Ft. Lauderdale, Florida	Empire State College
Mary Lou Harris	Continuing Education
Assistant Director	Saratoga Springs, New York
Continuing Education	Rebecca Strong,
Ohio University	Associate Dean
Athens, Ohio	Community Services
Mary Anne Varacalli	McHenry County College
Delaware County	Crystal Lake, Illinois
Community College	
Media, Pennsylvania	

Among LERN's most important functions is its role as a research organization, information clearinghouse, and forum in which members exchange information regarding successful practices in educational programming, including practices relating to the marketing and promoting of course selections to the public. Through this exchange of ideas and techniques, LERN and its members have developed substantial expertise in marketing and promoting adult and continuing education programs.

Many of the members of LERN distribute information about their course offerings and programs in a manner similar or identical to the manner chosen by respondents - that is, by the use of newspaper boxes for the distribution of free pamphlets, newspapers or fliers on municipal sidewalks. As a result, LERN and its members are concerned that, should the Court reverse the decision below, other municipalities may follow Cincinnati's example and attempt to regulate communication with prospective students. Such a result would cause educational providers, prospective students, other information providers and their recipients great hardship in continuing to carry on their dialogue with each other.

SUMMARY OF ARGUMENT

Adult and continuing education has played a long and distinguished role in the intellectual life of the Nation. Education providers such as the members of LERN depend to a great extent on the continued availability of streetcorner newspaper boxes as a cost-effective means to distribute information about their offerings.

There are no adequate alternatives for providing affordable dissemination of course catalogs to the segments of the student population reached by streetcorner newspaper boxes. In addition, LERN and its members are concerned that petitioner and its *amici* may attempt to use the designation "commercial speech" as a vehicle to accomplish content-based time, manner, place restrictions. Even if such an attempt was permissible, it would not be warranted given the information contained in the course catalogs.

ARGUMENT

A.

Western intellectual history has been likened to a great conversation across the ages.³ Adult and continuing education is an important vehicle for allowing ordinary citizens to take part in the conversation. Since Benjamin Franklin started his Junto discussion group in 1727,⁴ adult and continuing education has played an important role in American intellectual life. Indeed, the importance of adult and continuing education has been explicitly recognized by Congress, which has found, *inter alia*, that "lifelong learning . . . enable[s] citizens] to adjust to social, technological, political and economic changes" and "to participate in the civic, cultural or political life of the

³ R.M. Hutchins, *Preface to 1 Great Books of the Western World* at xi (1955).

⁴ C. Van Doren, *Benjamin Franklin* 74-80 (1938). Franklin seems to have borrowed the idea from Cotton Mather. *Id.* at 75.

Nation."⁵ By all accounts, interest in adult and continuing education has been increasing.⁶

⁵ Specifically, in addressing adult and continuing education Congress has found that:

"(1) accelerating social and technological change have had an impact on the duration and quality of life;

(2) the American people need lifelong learning to enable them to adjust to social, technological, political and economic changes;

(3) lifelong learning has a role in developing the potential of all persons, including improvement of their personal well-being, upgrading their workplace skills, and preparing them to participate in the civic, cultural, and political life of the Nation;

(4) lifelong learning is important in meeting the needs of the growing number of older and retired persons;

. . .

(7) more effective use should be made of the Nation's educational institutions in order to assist the people of the United States in the solution of community problems such as housing, poverty, government, recreation, employment, youth opportunities, transportation, health, and land use; and

(8) American society should have as a goal the availability of appropriate opportunities for lifelong learning for all its citizens without regard to restrictions of previous education or training, sex, age, handicapping condition, social or ethnic background, or economic circumstance."

Education Amendments of 1976, Pub. L. 94-482, § 101, 90 Stat. 2081, 2086 (now codified at 20 U.S.C. § 1002 (1988)).

⁶ The United States Department of Education estimates that in 1984 some 23 million people took adult education classes, of which only about 5 percent were enrolled as full-time students in a degree program. U.S. Department of Education,

(Continued on following page)

Contemporary course offerings are not restricted to the great ideas. In virtually every major city in the United States – and in many smaller cities as well – an adult may enroll in courses concerning virtually any subject, from French literature to computer programming.⁷ These courses enrich the lives of their students by providing citizens access to cultural and vocational opportunities that would not otherwise be available. They also add to the common heritage of American society. Other courses, which teach survival skills such as literacy or self-health and wellness, offer a more fundamental value to students and to society. Perhaps as important as the content of any particular course, students taking adult and continuing courses benefit from their continued interest in self-improvement. As a society we are improved by the efforts

(Continued from previous page)

Digest of Education Statistics 319 (1989) ("Digest of Education Statistics"). The Department also estimates that in 1982 more than 5 million adults were enrolled in adult and continuing education programs. *Id.* at 318. LERN estimates that the number participating may now approach 15 million people. In 1989, courses offered by the Fairfax County, Virginia, public school system alone attracted 55,000 adult students. Waterman, *How to Succeed in Two Easy Lessons*, Wash. Post, Jan. 4, 1990, at J9. Programs around the country are experiencing increasing enrollments. See, e.g., Durkin, *Struggling to Teach: Growing Success Puts Free College in Red*, Wash. Post, July 12, 1990, at J1.

⁷ Among the more notable educational offerings in adult and continuing education was a course in constitutional law taught at Washington Saturday College by Chief Justice Warren in 1968. Durkin, *Struggling to Teach: Growing Success Puts Free College in Red*, Wash. Post, July 12, 1990, at J1.

of individual members to improve themselves, particularly those who may be outside the scope and reach of traditional, formal post-secondary education.

From its beginning, adult and continuing education has been a decentralized, student-driven endeavor. In each locale, the educational offerings are tailored, often by the discipline of the marketplace, to the needs and wishes of the student population. Unlike more formal post-secondary education, adult and continuing education is designed to reach the broadest possible student population.⁸ Inclusiveness and ready access are guiding principles.

These principles and the diversity of program offerings compel educational providers to use methods of disseminating information about programs that reach into every segment of society. Streetcorner newspaper boxes are an important part of this dissemination process, as they provide one of the most cost effective ways to provide detailed information concerning the course offerings to the widest range of potential students. Although adult and continuing educators use a variety of means to communicate with the communities they serve, there are no adequate alternative methods which replicate all the advantages of streetcorner newspaper boxes.

⁸ In recognition of the fact that these programs serve a distinct student population, approximately 2,500 of the nation's 3,600 colleges and universities also offer adult and continuing education programs. Indeed, part-time college study, which includes adult and continuing education, is the fastest-growing segment of higher education nationwide, accounting for some 6 million students. Sanchez, *Johns Hopkins to Broaden Its D.C. Operation*, Wash. Post, Jan. 14, 1992, at B2.

For example, many educators distribute information through public libraries, typically using either a pamphlet rack or bulletin board. While library distribution is an important method of reaching some of the potential students of adult and continuing educational offerings, only library patrons may be contacted in this manner. But many potential students, including perhaps those most in need of literacy programs, are not likely to be reached through library distribution.

Another method for disseminating information is mass mailings of course catalogs. This alternative to streetcorner newspaper boxes, however, is also unsatisfactory. First, bulk mailing is prohibitively expensive.⁹ Second, unlike streetcorner newspaper boxes from which only truly interested potential students take course catalogs, mass mailings by definition mean providing catalogs to persons who have no interest in taking courses. Coupled with the inefficiency in targeting mass mailings, mailing costs many times more per enrolled student than newspaper box distribution.

A third distribution alternative to streetcorner newspaper boxes is newspaper inserts, which involves inserting a course catalog inside a newspaper, which is then sold at the newspaper's regular outlets, including

⁹ The cost of mass mailing has been increasing. The standard nonprofit postal bulk rate has doubled in the last three years. LERN estimates that it costs around \$150.00 per thousand brochures for distribution by mail as opposed to \$25.00 per thousand for distribution by streetcorner newspaper box.

streetcorner newspaper boxes. Inserts, however, have the same negative cost and targeting attributes of mass mailings.¹⁰

B.

The issue of whether adult and continuing education course catalogs were properly characterized by the district court as "commercial speech" is not now directly before the Court.¹¹ However, LERN and its members are concerned about this categorization.

Among LERN's members are public entities such as public school systems, municipal recreation departments, and state universities. The continuing education course catalogs of such institutions do not "propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). This is true even when a nominal enrollment fee is charged, because, as a matter of common sense, education is not a

¹⁰ By permitting streetcorner newspaper box distribution of for-profit newspapers but not educational materials standing alone, petitioner appears to argue that newspaper box distribution of adult and continuing education materials is permissible, but only if the education provider pays the newspaper to allow the materials to be inserted. As newspaper boxes containing newspapers with inserts present the same aesthetic and safety features as newspaper boxes containing only the inserts, it is difficult to discern the community interest served by compelling education providers to use inserts.

¹¹ Respondents did not appeal the district court's determination that their publications are commercial speech.

"commercial" activity when carried out by a public body.¹² Yet such catalogs are virtually identical in both form and content to those prepared by privately operated adult and continuing education providers.

The membership of LERN includes both for-profit and non-profit educators.¹³ LERN's experience quite plainly suggests that there is no significant difference in either the substance of the educational offerings,¹⁴ the catalogs, or in the methods of distributing course catalogs¹⁵ between education providers that may happen to have different corporate structures. For this reason, any attempt on the part of Cincinnati – or any other municipality – to distinguish between the course catalogs of one kind of provider and those of another bears little relationship to the interests advanced by petitioner. Streetcorner newspaper boxes containing the course catalogs of non-profit educational offerings present the same aesthetic and safety features as those containing for-profit catalogs,

¹² Even if a course catalog may be characterized as commercial speech, it may not be regulated as such if the actual content of the course offerings is protected speech. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983).

¹³ The United States Department of Education found 8,469 noncollegiate institutions offering post-secondary education in 1987-88. *Digest of Education Statistics* at 324. Of these, 659 were publicly owned, 1581 were private non-profit, and 6,229 were private for-profit. *Id.* This survey did not include public schools and municipal recreation departments.

¹⁴ Typically, for-profit educators will pioneer new types of courses, which, if successful, will be subsequently offered by non-profits as well.

¹⁵ Non-profits are charged lower postal rates for mailing course materials and catalogs.

or, for that matter, those containing for-profit newspapers. By arguing that it may regulate for-profit course catalogs because they are commercial speech, petitioner and its *amici* apparently seek to assert that a distinction can be made between identical speech acts based solely on the identity of the speaker.¹⁶

Categorizing speech as non-commercial or commercial may be helpful in analyzing certain cases. This is not such a case, however. The category of commercial speech serves mainly to allow states to protect against effects related to the content of speech. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989) (protecting educational atmosphere while preventing commercial exploitation of students at a state university). In this case, however, petitioner has expressed no interest whatever in the content of respondents' speech, but is merely using the lowered standard of review applicable to the regulation of commercial speech as a vehicle to justify the otherwise impermissible: a content-based time, manner, place restriction. See *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980) (time, manner, place restrictions must be content neutral).

¹⁶ One might try to distinguish the speech of private entities from those of public ones on the ground of motive, an approach not without difficulties. See *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 579-80 & n. 2 (1980) (Stevens, J. concurring). In any event, at the speech act level, the motive is the same: The education provider prints and distributes catalogs hoping to attract students to the courses. Facile distinctions based on ownership or corporate structure do not meet the regulator's burden of "distinguishing the harmless from the harmful." *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

* * *

Adult and continuing education providers, whether public or private, profit or non-profit, depend to varying degrees upon streetcorner newspaper box distribution. All types of continuing educators, not merely private, for-profit educators such as respondent Discovery Network, Inc., share an indivisible interest in the continued availability of this method of distribution of course materials.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM 1991

No. 91-1200

CITY OF CINCINNATI,

Petitioner,

—v.—

DISCOVERY NETWORK, INC. *et al.*,

Respondents.

BRIEF OF AMICI CURIAE

Interest of Amici Curiae

The Association of National Advertisers, Inc., ("A.N.A."), the American Association of Advertising Agencies ("A.A.A.A."), the National Association of Manufacturers ("NAM"), the Grocery Manufacturers of America ("GMA"), and the National Food Processors Association ("NFPA") respectfully submit this brief *amici curiae* in support of respondents in this case. Letters of consent to its filing have been lodged with the Clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of

commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

The American Association of Advertising Agencies is a national trade association organized under the laws of the State of New York. A.A.A.A.'s membership is comprised of over 730 advertising agencies doing business throughout the United States. A.A.A.A. members create and place some 80 percent of all national advertising and substantial amounts of local and regional advertising. In addition, A.A.A.A. members provide a full range of marketing services to their clients, including product promotion, public relations, direct marketing, merchandising, design and packaging services. A.A.A.A. is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.

The National Association of Manufacturers of the United States of America is a voluntary business association of more than 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. The members of NAM and these councils are vitally interested in the extent to which governments may restrict their ability to publicize product and service information.

The Grocery Manufacturers of America, Inc. is a non-profit trade association organized under the laws of the State of Delaware. GMA's members include approximately 140 manufacturers of food and other consumer products sold in retail outlets throughout the United States. The members use virtually all forms of media to advertise and communicate with consumers about their products nationwide. A central purpose of GMA is to advance the common interests of its members before governmental bodies and regulatory authorities.

The National Food Processors Association, the principal scientific and technical trade association for the food indus-

try, serves its members and consumers by representing the industry on legislative, regulatory and consumer issues. NFPA is the scientific voice of the food industry. The association's three research laboratories serve NFPA's 500 members, manufacturers of the nation's processed-packaged fruits and vegetables, meat and poultry, seafood, juices and drinks, and specialty products.

Summary of Argument

Cincinnati seeks to draw a bright-line distinction between newspapers and commercial speech. Newspapers are permitted virtually unrestricted access to an important medium of communication—sidewalk newsracks—while speech labelled as "commercial" by Cincinnati officials is flatly banned. Cincinnati seeks to justify the discriminatory treatment by arguing that commercial speech is less important than newspapers. But Cincinnati's rationale for censorship breaks down on two levels. First, the speech at issue in this case, whatever its label, deserves plenary free speech protection. Speech informing individuals of educational and residential opportunities is entitled to full First Amendment protection. *Bigelow v. Virginia*, 421 U.S. 1 (1975); *Shelly v. Kraemer*, 334 U.S. 1 (1948). Second, permitting the censorship of speech to turn on a subjective, conclusory assessment of its relative importance is an intellectual blind alley. Existing differences in First Amendment standards governing commercial and non-commercial speech are not a reflection of the so-called relative unimportance of commercial speech. Rather, they are the logical consequences of differences between a "speaker-centered" and "hearer-centered" jurisprudence. Political and esthetic speech is intensely concerned with the self-expressive interest of the speaker. *Cohen v. California*, 403 U.S. 15 (1971). Commercial speech is intensely concerned with the instrumental interest of hearers in receiving information that enhances the capacity for informed choice. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). When commercial speech does not enhance the hearer's capacity for informed choice because it

is false or misleading or involves unlawful activity, the speech does not qualify for First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Friedman v. Rogers*, 440 U.S. 1 (1979). When, however, hearers possess a cognizable interest in receiving commercial information because it enhances their capacity for informed choice, commercial speech may not be banned pursuant to a conclusory assertion about its relative unimportance. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977). See Point I, *infra* at 8-15.

Once Cincinnati is denied the luxury of cloaking its discriminatory treatment of commercial speech in a conclusory and inaccurate assertion of its relative unimportance, the speech ban at issue in this case may not be sustained under any level of First Amendment scrutiny. First, the scheme is invalid as an attempt to regulate speech on the basis of content. E.g., *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991); *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). See Point II.A., *infra*, at 16-19. Second, the regulation is not a narrowly tailored means of directly advancing Cincinnati's asserted regulatory interests. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). See Point II. B., *infra*, at 19-21. Third, Cincinnati's regulatory scheme rests on a facially unconstitutional ordinance imposing a total ban on the distribution of commercial handbills in any public place. The effect of such a scheme is to outlaw all commercial handbilling unless it receives the prior permission of the authorities; a classic, unconstitutional prior restraint. *Lowe v. S.E.C.*, 472 U.S. 181, 204-05 (1985). *Id.* at 211, 234-35 (White, J. concurring, joined by Chief Justice Burger and Rehnquist, J.). See Point II. C., *infra*, at 21-23. Finally, Cincinnati's regulation forces commercial speakers to purchase

space in a newspaper if they wish to distribute their commercial messages via newsracks. Accordingly, it forces commercial speakers to subsidize newspapers as the price of distributing a commercial message via a sidewalk newsrack. While commercial speakers recognize the significant advantages of conveying commercial messages in newspapers, they cannot be compelled by law to do so. E.g. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977). See Point II. D., *infra*, at 23-25.

ARGUMENT

Introductory Statement

Cincinnati's newsrack regulation is neither content-neutral,¹ nor narrowly tailored.² Rather, Cincinnati has granted one

¹ In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), three members of the Court expressed the opinion that a content-neutral ban on all sidewalk newsracks would be constitutional. *Id.* at 773 (dissenting opinion of White, J., joined by Stevens and O'Connor, JJ.). The opinion for the Court declined to reach the issue. *Id.* at 762, n.7. The Chief Justice and Justice Kennedy did not participate in *City of Lakewood*.

Given the critical role of streets and sidewalks as traditional fora for expression, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939), most lower courts have invalidated total bans on sidewalk newsracks. E.g., *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107 (D.R.I. 1987); *Chicago Newspaper Publishers Association v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988); *Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District*, 774 F.Supp. 977 (D.S.C. 1991); *Southern New Jersey Newspapers, Inc. v. State of N.J. Dep't of Transportation*, 542 F. Supp. 173 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228 (E.D. Pa. 1974); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (Cal. App. 4th Dist. 1975); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (N.J. Super. L. 1985). *But see, Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61 (3d Cir. 1990) (dictum).

² Courts are unanimous in upholding reasonably specific, narrowly tailored geographical, financial, numerical, size and appearance

category of constitutionally protected speech—newspapers—unlimited access to sidewalk newsracks, while absolutely banning commercial speakers from the desirable medium. *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 465 (6th Cir. 1991). See *City of New York v. Learning Annex, Inc.*, 150 Misc.2d 791, 571 N.Y.S.2d 380 (Sup. Ct. N.Y. Co. 1991) (invalidating selective ban on commercial users of newsracks).

Cincinnati attempts to defend its discriminatory regulation by arguing that speech delivered by newspapers is more important than speech delivered by commercial speakers. *Amici* do not quarrel with the welcome recognition of the high degree of constitutional protection available to newspapers. See generally Stewart, "Or of the Press", 26 *Hast. L.J.* 631 (1975). Nor do *amici* quarrel with the proposition that Cincinnati may impose narrowly-tailored regulations on the use of sidewalk newsracks that directly advance its legitimate interests in safety, convenient public passage and esthetics. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). But Cincinnati has not attempted a narrowly tailored regulatory response to newsracks.³ Instead, Cincinnati seeks to grant newspapers

requirements on the use of sidewalk newsracks. E.g., *Jacobsen v. Harris*, 869 F.2d 1172 (8th Cir. 1989); *Jacobsen v. Crivaro*, 851 F.2d 1067 (8th Cir. 1988); *Gannett Satellite Information Network, Inc. v. Township of Pennsauken*, 709 F. Supp. 530 (D.N.J. 1989). Standardless licensing schemes are, however, unconstitutional. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

³ The Cincinnati regulation takes a curious form. An outdated, facially unconstitutional city ordinance dating from the era of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), bans the distribution of all commercial handbills in any public place. *Cincinnati Municipal Code*, Sec. 714-23. Recognizing that the ordinance is unconstitutional in virtually all its applications, Cincinnati enforces it selectively. Since no exemption was granted to respondents, however, Cincinnati argues that the distribution of commercial material through the medium of sidewalk newsracks is prohibited by Sec. 714-23, despite its facial invalidity. Such a regulatory scheme is both an unconstitutional prior

unlimited use of newsracks with no effort to control their number, size, location or appearance, 946 F.2d at 467, n.3,⁴ while flatly banning commercial speakers from access to newsracks because, in Cincinnati's view, commercial speech is insufficiently important to warrant access. Discriminatory treatment of such magnitude and irrationality aimed at a category of protected speech cannot survive First Amendment scrutiny.

Sustaining Cincinnati's casual exercise in selective censorship would eviscerate the Court's landmark holdings in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977). In *Virginia Pharmacy*, the Court held that efforts to censor commercial speech may not be premised on an assertion that advertising is too unimportant to warrant First Amendment protection. 425 U.S. at 763-765. In *Linmark Associates*, the Court held that a significant medium of commercial speech could not be suppressed even to advance an interest as important as racial integration, despite the existence of alternative means of communication. In this case, Cincinnati advances the alleged unimportance of commercial speech to justify a selective ban on commercial speech; a selective ban that fails to advance any of Cincinnati's asserted regulatory interests. If such a clear mismatch between asserted regulatory interest and a selective ban on commercial speech is upheld on the grounds that commercial speech is too unimportant to require more precise analysis, little will remain of First Amendment protection for commercial speech.

restraint and a standardless licensing system. *Lowe v. S.E.C.*, 472 U.S. 181 (1985); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Lovell v. Griffin*, 303 U.S. 444 (1938). See Point II. C. *infra* at 21.

⁴ The District Court found that respondents' commercial newsracks accounted for only 62 of the 1,500-2,000 newsracks on the Cincinnati streets. 946 F.2d at 467.

I.

FIRST AMENDMENT STANDARDS GOVERNING COMMERCIAL AND NON-COMMERCIAL SPEECH REFLECT THE DIFFERING SPEECH INTERESTS PRESENT IN EACH CONTEXT, AND NOT A DETERMINATION THAT SPEECH ABOUT COMMERCE IS LESS "IMPORTANT" THAN SPEECH ABOUT ART, SCIENCE, RELIGION OR POLITICS.

The District Court accepted Cincinnati's characterization of the speech at issue in this case as "commercial". See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). Accordingly, analysis of the free speech issues posed by Cincinnati's ban has unfolded under the rubric of the commercial speech doctrine. While amici believe that Cincinnati's ban cannot survive scrutiny under the commercial speech doctrine, this case illustrates the danger of substituting labels for analysis in the area of free speech. The speech at issue in this case—information concerning educational and residential opportunity—directly implicates two of our most cherished constitutional values: educational freedom and residential mobility. Whatever label is ultimately placed on such speech, it is entitled to plenary constitutional protection because it is so closely bound up with the enjoyment of core constitutional values. As this Court has explicitly held, merely because information is delivered with the motive of earning a profit, it does not lose its First Amendment status. E.g., *Bigelow v. Virginia*, 421 U.S. 1 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The speech at issue in *New York Times v. Sullivan* was, after all, a paid advertisement soliciting funds. The speech at issue in *Bigelow* was a classic paid advertisement for the services of a health clinic. Indeed, one court has already held that speech virtually identical to the educational information at issue herein cannot be characterized as commercial for First Amendment purposes. *City of New York v. Learning Annex, Inc.*, 150 Misc. 2d 791, 571 N.Y.S. 2d 380 (Sup. Ct. N.Y. Co. 1991). Accordingly, amici urge the Court

to apply traditional free speech principles to Cincinnati's regulation.

Even if, however, the Court accepts the characterization of the speech at issue in this case as commercial,⁵ Cincinnati's scheme cannot withstand constitutional scrutiny. First Amendment standards governing commercial and non-commercial speech are not identical. For example, commercial speech proposing an unlawful transaction is entitled to no constitutional protection, while the same genre of speech in a non-commercial setting receives substantial protection under the "clear and present danger" test. Compare, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Similarly, while false or misleading commercial speech is not entitled to First Amendment protection under the Court's precedents, it is an article of faith in the non-commercial speech area that there is no such thing as an officially false idea. Compare *Friedman v. Rogers*, 440 U.S. 1 (1979) with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Collin v. Smith*, 447 F.Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).⁶

⁵ The Court has noted the difficulty of distinguishing between commercial and non-commercial speech. E.g. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Id.* at 81 (Stevens, J. concurring); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 481-82 (1989). This case illustrates the dilemma, since newspapers may carry the identical message as a commercial handbill, but are treated as non-commercial speech. The point at which a collection of commercial handbills with minimal commentary turns into a newspaper is impossible to define.

As did the Courts below, amici assume for the purposes of this argument the capacity to draw a principled line between commercial and non-commercial speech. In fact, the two categories blend inexorably.

⁶ See generally *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976). Compare, *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) with *In re Primus*, 436 U.S. 412 (1978). Cf. *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (plurality opinion).

Seeking to explain the differential in First Amendment standards by ascribing a lower value to commercial speech is, however, triply unfortunate.

First, differential standards of free speech protection should not turn on subjective, necessarily content-based value judgments about the relative social worth of categories of expression. *Young v. American Mini Theaters*, 427 U.S. 50, 82, n.6 (1976) (Powell, J. concurring); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J. concurring). Implicit in a determination that commercial speech is less important than non-commercial speech is a complex set of value judgments that the First Amendment leaves to individuals, not to the State. Characterizing speech about religion, esthetics or politics as important, while denigrating the importance of speech about commerce, masks an impermissible cultural judgment. In effect, it says that speech about ideas, the "business" of intellectuals, is free from governmental restriction; but that speech about everyone else's "business" is fair game for casual regulation by the State. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384 (1974); Director, *The Parity of the Economic Marketplace*, 7 J.L. & Econ. 1 (1964); Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

Second, as this case illustrates, denigrating the importance of commercial speech encourages officials to avoid the difficult task of deciding whether a restriction on commercial speech is "narrowly tailored" to "directly advance" the State's asserted interests. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990). As the Sixth Circuit demonstrated below, Cincinnati's legitimate concern with esthetics and safety cannot justify a selective, total ban on commercial newsracks, since the commercial or non-commercial nature of material in a newsrack has no effect on the receptacle's appearance or safety. 946 F.2d at 467. See *Boos v. Barry*, 485 U.S. 312 (1988).

Finally, the assertion by Cincinnati that commercial speech is less important than non-commercial speech is wrong, both at the level of society and the individual. The First Amendment protects political democracy and free markets by assuring the uncensored flow of information on which each depends. Political democracy requires robust free speech protection in order to assure that voters receive information needed to make an informed choice. See Meiklejohn, *Free Speech and Its Relationship to Self-Government* (1948). Free markets also depend upon informed choice. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976) (recognizing the relationship between commercial speech and efficient markets). See Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1 (1977). Consumers vote with their dollars, just as citizens vote with their ballots. If government can casually control the flow of information to voters, the free political choice at the core of a functioning democracy is imperilled. See Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191. Similarly, if government can casually control the flow of commercial information to consumers, the free market choice at the core of our economic system is imperilled. See Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971).

Moreover, from the standpoint of an individual hearer, it is often demonstrably more important to receive information about a product critical to health or happiness than to receive non-commercial information. Compare, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-64 (1976) (price advertising of prescription drugs) and *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 86 (1977) (real estate information) with *Cohen v. California*, 403 U.S. 15 (1971) (scatological phrase on speaker's jacket); and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag). Cincinnati's dismissive approach radically undervalues the informational significance of commercial

speech. The Sears, Roebuck Catalogue was as influential in shaping our national ethic as the McGuffey Reader. Contemporary commercial speech provides Americans with a flow of information concerning educational opportunities, health care options, recreational choices, investment opportunities and employment options, to mention only a few categories. Is Cincinnati prepared to dispute the relative "importance" of the price information about prescription drugs in *Virginia Pharmacy* and the march by the Nazi party protected in *Sko-kie*? The relative value of information about health insurance and burning the American flag protected in *Texas v. Johnson*? Or the relative importance of information about educational opportunities at issue in this case and the invitation to "Fuck the Draft" held protected in *Cohen v. California*?

In fact, the differential First Amendment protection that concededly exists between commercial and non-commercial speech is not attributable to official judgments about the relative importance of the two categories of protected speech.⁷ Rather, it reflects significant differences between the interests of speakers and hearers in the two contexts.

In most non-commercial settings, would-be censors confront two distinct sets of interests militating strongly in favor of free speech: the dignitary interest of the speaker in self-expression; and the instrumental interest of the hearer in receiving information. Compare, T. Emerson, *The System of*

⁷ In *Virginia Pharmacy*, 425 U.S. at 762-63 and n.24, this Court outlined several "commonsense differences" between commercial and non-commercial speech. "The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting and political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sin qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Id.* at n.24. This Court, however, despite numerous opportunities to consider relevant distinctions, has never cited relative importance as a basis for differentiation between commercial and non-commercial speech.

Free Expression (1970) with A. Meiklejohn, *Political Freedom* (1960). Not surprisingly, when the two sets of interests coincide, free speech protection is at its apogee. E.g., *Stromberg v. California*, 283 U.S. 359 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971). When they are in tension, the Court has recognized that the speaker's interest in self-expression supports a broad toleration principle that protects self-affirming speech, even when it is offensive to hearers. E.g. *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). While concerns of hearers are accorded significant weight in certain non-commercial settings, e.g., *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (right to receive information from abroad); *Frisby v. Schultz*, 487 U.S. 474 (1988) (right to be free from "focused picketing" at home); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (right not to be "captive audience"), it is fair to characterize, indeed, to celebrate, the First Amendment jurisprudence of this Court in areas of religion, politics, art and science as "speaker-centered". E.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). See generally Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986).

Commercial speech that "merely proposes a commercial transaction"⁸ may not involve dignitary self-expression. A toleration-based concern with the *speaker's* interest in self-expression is, therefore, less intense in the commercial speech area. But the *hearer's* interest in receiving commercial speech is, if anything, more intense than in many non-commercial settings. See Neuborne, *The Pomerantz Lecture: First Amendment and Government Regulation of Capital Markets*, 55 Brooklyn L. Rev. 5, 31-32 (1989). The differ-

⁸ The phrase is drawn from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

ences in First Amendment protection accorded to commercial and non-commercial speech are, therefore, the logical consequences of differences between a "speaker-centered" and a "hearer-centered" jurisprudence, and not, as Cincinnati argues, a consequence of the diminished importance of commercial speech. Thus, commercial speech about unlawful activities and false or misleading commercial speech is not constitutionally protected because hearers have no interest in receiving it.

Once a cognizable hearer interest is present, as it unquestionably is in this case, the Court has repeatedly ruled that commercial speech is entitled to significant First Amendment protection. In the years since *Virginia Pharmacy*, the Court has repeatedly applied a "hearer-centered" analysis in granting First Amendment protection to a free flow of commercial speech. E.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976) (right to receive commercial messages); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 96-97 (1977) (right to receive real estate information); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (right to receive birth control information); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) (right to receive price information on legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (right to receive information on electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (right to receive information on legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (right to receive birth control information); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (right to receive information on legal services); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 109-111 and n.18 (1990) (same). Indeed, only when a cognizable hearer interest has been absent has the Court upheld censorship of commercial speech. E.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (risk of misleading hearers justifies restriction on use of trade names by optometrists); *Pittsburgh Press Co.*

v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (lack of cognizable hearer interest justifies banning speech proposing unlawful commercial transaction); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) (safety interest of student-hearers justifies stringent regulation of outsiders in college dormitories; remanded to determine whether regulation unconstitutionally overbroad).⁹

Cincinnati's failure to appreciate the hearer-centered nature of commercial speech led it to a regulatory decision based solely on an assessment of the commercial speaker's interest; an assessment reminiscent of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that completely overlooked the interest of hearers in the free flow of commercial information. The Sixth Circuit properly vacated such a myopic regulatory judgment, leaving Cincinnati free to enact "narrowly tailored" rules governing sidewalk newsracks that are sensitive to a hearer's right to receive commercial information relevant to the making of informed market choices.

⁹ In *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), the Court upheld a regulation banning casino advertising "aimed" at natives of Puerto Rico. The regulation, as modified by the Supreme Court of Puerto Rico, permitted casino advertising in the Spanish language press and the distribution of promotional material in Spanish, despite the fact that natives would read it. As modified by the Supreme Court of Puerto Rico, therefore, casino advertising was widely available throughout the Commonwealth, as long as it was not "aimed" at natives. Thus, *Posadas* is an example of the regulation of advertising that allegedly improperly targets an audience deemed particularly vulnerable by the legislature. No issue of improper targeting is present in this case.

II.

**CINCINNATI'S ATTEMPT TO GRANT NEWSPAPERS
AN UNRESTRICTED MONOPOLY ON THE USE OF
NEWSRACKS, WHILE BARRING COMMERCIAL
SPEAKERS FROM ACCESS TO THE MEDIUM, VIOLATES THE FIRST AMENDMENT**

Once Cincinnati is denied the luxury of cloaking its content-based censorship in a conclusory and inaccurate assessment of the relative "unimportance" of commercial speech and is required to test its regulatory judgment against the First Amendment, the discriminatory regulation cannot be sustained.

A. Cincinnati's Regulation is Content-Based, Since It Discriminates Between Categories of Speech Without Any Functional Justification

The core of the First Amendment is its ban on content-based discrimination. Since political and economic decisions in a free society should reflect the informed preferences of individuals, any attempt by government to limit the free flow of information endangers our system. But when government seeks to distort the raw material of choice by artificially removing a disfavored point of view from the information marketplace, the threat to our system is particularly acute. *Boos v. Barry*, 485 U.S. 312 (1988); *Schacht v. United States*, 398 U.S. 58 (1970). See generally Stone, *Content Discrimination and the First Amendment*, 25 Wm. & Mary L.Rev. 189 (1983). Accordingly, the Court has consistently invalidated speech regulations that permit government to discriminate on the basis of content. E.g., *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991) (victim compensation provisions applying solely to proceeds of convict speech unconstitutional as content-based); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax rates keyed to magazine content unconstitutional as content-based); *Minneapolis Star & Tribune Com-*

pany v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (newspaper tax rates keyed to circulation unconstitutional as content-based); *Police Dep't. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (picketing rules distinguishing between labor picketing and other subject matter unconstitutional as content-based); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (newspaper tax rates keyed to circulation unconstitutional).

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S.Ct. 501 (1991), for example, this Court invalidated an attempt by New York State to impound the proceeds of a convict's crime-related writings in order to make them available to his victim for restitution. The Court readily acknowledged that victim restitution was a highly worthwhile government interest, but, nevertheless, invalidated the regulations because they treated the proceeds of speech more harshly than other forms of property. Moreover, it matters not whether the government actually intends to manipulate the marketplace of ideas. *Simon & Schuster*, 112 S.Ct. at 509. Regulations permitting content-based censorship are presumptively unconstitutional even if they are enacted in good faith. *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). In *Minneapolis Star*, the State imposed a differential tax rate on newspapers based on circulation. The Court explicitly noted that no evidence existed of an attempt to manipulate the marketplace of ideas. Nevertheless, the Court invalidated the differential tax because it empowered the government to discriminate among newspapers on the basis of content. See also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).¹⁰

¹⁰ Where no possibility of discrimination on the basis of content is present, government may treat speakers differently. Thus, in *Leathers v. Medlock*, 111 S.Ct. 1438 (1991), the Court upheld a tax levied on a segment of the media because no potential for discrimination on the basis of content was present, since the material carried by both taxed and untaxed categories of speaker was quite similar.

Cincinnati's attempt to ban commercial speakers from sidewalk newsracks, while granting newspapers unrestricted access to them, overtly draws a regulatory line on the basis of content. *Police Dep't. of City of Chicago v. Mosley*, 408 U.S. 92 (1972). The discriminatory regulation artificially distorts the mix of information and ideas that is the raw material of free choice. Accordingly, it is vulnerable to constitutional attack unless the discriminatory regulation is necessary to advance an interest of extraordinary importance. While *amici* agree that safety and esthetics are legitimate government interests that would justify narrowly tailored, content-neutral regulation of newsracks, neither safety nor esthetics supports a content-based distinction between commercial speech and newspapers. As in *Simon & Schuster*, the content-based line drawn by Cincinnati is simply not germane to the advancement of the relevant State interests. *Simon & Schuster*, 112 S.Ct. at 510-511. See also *Boos v. Barry*, 485 U.S. 312 (1988).

Amici do not contend that the ban on content-based censorship requires identical treatment of commercial and non-commercial speech. Where functional justifications for disparate treatment exist, as in the areas of false or misleading speech or speech about unlawful action, *amici* agree that different First Amendment standards govern the two categories of speech. See *supra* Point I at 12-15. But where, as here, no functional basis exists to treat them differently, the ban on content-based censorship applies to prevent well-meaning censors from allowing their subjective values to distort the free flow of information critical to both political and economic choice.¹¹

11 The Court has determined that the "secondary effects" associated with businesses disseminating sexually explicit speech functionally justify a content-based distinction in their regulation. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). See also *United States v. Kokinda*, 110 S.Ct. 3115 (1990) ("secondary effects" caused by solicitation justify disparate treatment of solicitation and distribution). Where, however, the regulated category of speech does not create a "second-

Finally, the effect of Cincinnati's ban is to erect a distinction between established and less established commercial speakers. Established commercial speakers will find it relatively easy to buy access to sidewalk newsracks by purchasing space in newspapers. Less established speakers will be unable to utilize the medium, since they cannot afford to purchase advertising space in a newspaper. In effect, therefore, the distinction created by the scheme is precisely the content-based distinction between established and struggling speakers that this Court condemned in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).¹²

B. Cincinnati's Regulation Violates the Rights of Consumers to Receive Information Relevant to Market Choices

Even if one ignores the content-based nature of Cincinnati's regulation, it operates to limit the flow of information to consumers relevant to the making of informed economic choices. Accordingly, it violates their First Amendment rights unless it is a "narrowly tailored" attempt to "directly advance" a legitimate State interest. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

ary effect" justifying disparate regulation, the Court has applied the ban on content-based censorship to invalidate attempts to distinguish between categories of speech based on content. *Boos v. Barry*, 485 U.S. 312 (1988). Cincinnati has made no attempt to argue that newsracks containing commercial material exert "secondary effects" that differ from newspaper newsracks.

12 Cincinnati's insistence upon labelling the publications at issue in this case as commercial speech raises the prospect of content-based censorship of a wide variety of non-commercial speech merely by labelling it as commercial. For example, many local newspapers containing significant amounts of advertising are virtually indistinguishable from the materials in this case. The power to impose content-based censorship on newspapers is enhanced by Cincinnati's insistence that newspapers be "of general circulation [emphasis added]" in order to warrant access to newsracks. See Amended Regulation 38. Whether a local newspaper is "of general circulation" is left to bureaucratic discretion.

Peel v. Attorney Registration and Disc. Comm'n, 496 U.S. 91 (1990). While narrowly tailored regulations limiting the size, placement, number and appearance of sidewalk newsracks would advance Cincinnati's legitimate interest in safety, esthetics and convenient public passage, a total ban on commercial newsracks cannot be called "narrowly tailored", since it is far broader than reasonably necessary to advance the State's legitimate interests. E.g., *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Providence Journal Co. v. City of Newport*, 665 F. Supp. 107 (D.R.I. 1987); *Chicago Newspaper Publishers Association v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988); *Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District*, 774 F. Supp. 977 (D.S.C. 1991); *Southern New Jersey Newspapers, Inc. v. State of N.J. Dep't of Transportation*, 542 F. Supp. 173 (D.N.J. 1982); *Philadelphia Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228 (E.D. Pa. 1974); *Remer v. City of El Cajon*, 52 Cal. App. 3d 441, 125 Cal. Rptr. 116 (Cal. App. 4th Dist. 1975); *Passaic Daily News v. City of Clifton*, 200 N.J. Super. 468, 491 A.2d 808 (N.J. Super. L. 1985). Moreover, the distinction between commercial speech and newspapers palpably fails to "directly advance" the State's asserted interests.

In *Linmark Associates*, the Township of Willingboro sought to ban only one method of informing potential buyers of the availability of houses for sale—"For Sale" signs displayed on the seller's property. Willingboro argued, much as Cincinnati argues in this case, that adequate alternative means of communication existed, such as handbills and newspaper advertising; and that the restriction was necessary to prevent the erosion of integrated neighborhoods through panic selling and racial "blockbusting". Despite the availability of alternative means of communication and the undoubtedly legitimate state interest in maintaining racial integration, the Court invalidated the restriction on the free flow of commercial information. *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977). Cincinnati's selective attempt to

close newsracks solely to commercial speakers is even less defensible than was Willingboro's attempt to ban public "For Sale" signs. As in *Linmark*, the asserted alternative means of communication are far less effective and much more expensive. Even more importantly, as in *Linmark*, the ban is considerably broader than reasonably necessary to advance the State's interest, which, in any event, is not "directly advanced" by the bright-line distinction between newspapers and commercial leaflets. In *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91 (1990), this Court reiterated the obligation of a commercial censor to use narrowly tailored means to advance the State's interest. Wholesale limitations on potentially helpful commercial information cannot be imposed when more narrowly tailored regulations would clearly be sufficient. Since more narrowly tailored regulations relating to size, placement and appearance could clearly satisfy Cincinnati's articulated interests, a blanket ban on all commercial newsracks is unreasonably broad.

C. Cincinnati's Regulation is a Facially Unconstitutional Prior Restraint Since It Purports to Ban All Commercial Speech Activity That Does Not Receive a Discretionary Exemption From a Total Ban on Commercial Handbilling

Cincinnati retains on its books an ordinance, dating from the era of *Valentine v. Chrestensen*, absolutely forbidding the distribution of commercial handbills in any public place.¹³ *Cincinnati Municipal Code*, Sec. 714-23. When *Virginia Pharmacy* overruled *Valentine v. Chrestensen* and held that commercial speech enjoys significant First Amendment protection, the Cincinnati ordinance was rendered unconstitutional in virtually all its potential applications. Despite the ordinance's blatant unconstitutionality, Cincinnati continues

¹³ Cincinnati defines commercial handbills as:

any printed or written matter . . . which advertises for sale any merchandise . . . or which directs attention to any business or mercantile or commercial establishment . . . for the purpose of either directly or indirectly promoting the interest thereof by sales. . . . *Cincinnati Municipal Code*, Sec. 701-1-C.

to give it legal force, although it enforces the ordinance selectively to ban only certain types of commercial speech. The Department of Public Works initially declined to enforce the ordinance against respondents, granting them a permit to use sidewalk newsracks under Amended Regulation 38.¹⁴ 946 F.2d at 466. In February 1990, however, the Cincinnati City Council directed the Department of Public Works to enforce the underlying ban on distributing commercial handbills against respondents. Thus, Cincinnati's regulatory scheme consists of a facially unconstitutional ordinance imposing a total ban on the distribution of commercial handbills, tempered by a standardless power to grant exceptions to the complete ban. The effect of such a scheme is to outlaw all commercial handbilling unless it receives the prior permission of the authorities; a classic, unconstitutional prior restraint. *Lowe v. S.E.C.*, 472 U.S. 181, 204-05 (1985). *Id.* at 211, 234-35 (White, J. concurring, joined by Chief Justice Burger and Rehnquist, J.).

Moreover, since such a regulatory scheme rests on a facially unconstitutional regulation and vests totally unbridled discretion in city authorities to decide when to invoke it, the scheme is clearly unconstitutional. As in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), Cincinnati may not use a facially unconstitutional statute as a device to regulate commercial speech. While *amici* are mindful that the First Amendment overbreadth doctrine is not fully applicable to commercial speech, *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-381 (1977), attempting to regulate protected speech by granting *ad hoc* exemptions from a statute that is unconstitutional in virtually every application is the equivalent of ruling by lawless fiat.¹⁵ This Court has invalidated standard-

¹⁴ Amended Regulation 38 is, itself, a standardless permit system, invalid under *City of Lakewood*.

¹⁵ Over a hundred years ago, in *United States v. Reese*, 92 U.S. (2 Otto) 214 (1875), the Court noted the danger of governing by blunderbuss statute.

(footnote continued)

less licensing schemes governing access to sidewalk newsracks. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). See *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hynes v. Borough of Oradell*, 425 U.S. 610 (1976). Although Cincinnati's route is somewhat more tortuous, the result is a standardless licensing system even more offensive to First Amendment principles than the scheme invalidated in *City of Lakewood*, since the range of discretion is absolute.

D. Cincinnati's Regulation Violates the Rights of Commercial Speakers By Forcing Them to Subsidize Non-Commercial Speech as the Price of Access to Sidewalk Newsracks

Commercial messages may be delivered in at least two ways. A commercial speaker can attempt to communicate directly with potential customers through handbills, hawkers and signs. Sidewalk newsracks provide an inexpensive method of engaging in such direct communication. Alternatively, a commercial speaker may communicate indirectly, by purchasing space in a non-commercial medium like a newspaper in order to disseminate the identical message. Cincinnati's regulations force commercial speakers to purchase space in a newspaper if they wish to distribute their commercial messages via newsracks. While most commercial speakers recognize the significant advantages of conveying commercial messages in general publications, they cannot be compelled by law to do so. The Court has never tolerated laws forcing individuals to subsidize the speech of third-persons as the price of speaking themselves. E.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (right of reply statute unconstitutional); *Wooley v. Maynard*, 430 U.S. 705 (1977) (coerced speech on license plates invalid); *Elrod v. Burns*, 427 U.S. 347 (1976) (linking public employment to political affili-

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. 92 U.S. at 221.

ation unconstitutional); *Branti v. Finkel*, 445 U.S. 507 (1980) (same); *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990) (same); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (limits on involuntary use of union shop agency fees); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (limits on involuntary use of bar dues). Where a commercial speaker wishes to communicate directly with the public, either because it is too expensive to purchase space in a newspaper or magazine¹⁶, or because the direct communication appears more effective, or because the commercial speaker does not wish to subsidize the non-commercial publication¹⁷, the speaker cannot be penalized by being excluded from a significant medium of communication. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986).

In *Pacific Gas & Electric*, the Court ruled that public utilities could not be forced to include the speech of third-persons in their billing envelopes as the price of communicating directly with the public. In this case, commercial speakers must pay a literal price to communicate with the public through sidewalk newsracks by subsidizing the publication with monopoly access to the newsracks. Since Cincinnati has not even attempted to posit a State interest in forcing commercial speakers to subsidize newspapers as the price of using newsracks, the grant of monopoly access to newspapers cannot be sustained.

Moreover, since *Tornillo* protects the press from being forced to carry involuntary messages, there is no guaranty that a newspaper will accept a commercial speaker's submis-

¹⁶ Since sidewalk newsracks are less expensive than individual handbills, they provide an important "circulation" medium for less established commercial speakers. *Ex parte Jackson*, 96 U.S. (6 Otto) 727, 733 (1877). Established ventures are better able to afford the far more expensive technique of purchasing space in non-commercial publications.

¹⁷ In a community with only one local newspaper, the effect is to force commercial speakers to subsidize an editorial policy with which they may strongly disagree as the price of gaining access to sidewalk newsracks.

sion. In effect, therefore, Cincinnati's scheme gives newspapers a veto over a commercial speaker's access to a sidewalk newsrack. If, for example, a Cincinnati museum wished to advertise the opening of a controversial exhibit of photographs, the advertising standards of local newspapers would determine the museum's access to a sidewalk newsrack. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976).

CONCLUSION

For the above-cited reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Dated: New York, New York
June 1, 1992

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No. 91-1200

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

v.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF OF THE INSTITUTE FOR
JUSTICE AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

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No. 91-1200

In The
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THE CITY OF CINCINNATI,

Petitioner,

v.

DISCOVERY NETWORK, INC., et al.,

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For The Sixth Circuit

BRIEF OF THE INSTITUTE FOR
JUSTICE AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Institute for Justice submits this brief as amicus curiae in support of the respondents. The Institute has secured the consent of the parties to the filing of this Brief and letters of consent have been filed with the Clerk.

The Institute for Justice is a non-profit, public interest legal foundation dedicated to securing full constitutional protection for economic liberty, private property rights, and the First Amendment. The Institute's commitment to guaranteeing constitutional protection for commercial speech and reinvigorating the founding principles of the

First Amendment impels our involvement in the instant case.

This case provides the Court with the opportunity to determine the protections afforded commercial speech in a wide variety of contexts. Therefore, the case directly implicates an integral component of the Institute's mission. The Institute further believes that its views concerning commercial speech doctrine in constitutional jurisprudence will assist the Court in resolving the important legal issues involved in this case.

STATEMENT OF THE CASE

In 1990, the City of Cincinnati began to enforce an already-existing, but previously unenforced ordinance prohibiting the distribution of "commercial handbills" on public property. Cincinnati Municipal Code § 714-23. The ban applied to newspaper-style racks, holding commercial literature, located on public property. However, newspapers and other literature considered non-commercial by the City had unlimited access and distribution rights on public property in the City of Cincinnati. Respondents, Discovery Network, Inc. and Harmon Publishing Co., challenged this prohibition as an unconstitutional infringement of commercial speech.

During a hearing in the district court, the City stated that the commercial distribution racks posed aesthetic and safety problems for Cincinnati. The City, however, could not provide any reasoned distinction between commercial and non-commercial racks in this regard. The

City Architect also stated that the City could easily alleviate any aesthetic and safety concerns by regulating the color and size of all distribution racks. Nevertheless, the City, citing concerns for the potential proliferation of racks on the streets of Cincinnati, chose to eliminate completely all distribution of commercial publications on public property.

The district court, applying the four-part test for commercial speech set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980), declared the ban unconstitutional. Under *Central Hudson, id.*, a commercial speech regulation is constitutional if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and (4) is not more extensive in its regulation of commercial speech than is necessary to serve that interest. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989), this Court held that the fourth prong of the *Central Hudson* test is met if there is a "reasonable" fit between the means chosen by the government and the ends directly advanced by the statute or ordinance. The district court in the instant case found that the Cincinnati ordinance did not constitute a "reasonable" fit between means and ends. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court and held Cincinnati's complete prohibition on the distribution of commercial literature on public property violative of the First Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENT

The First Amendment protects the free flow of political and commercial information. In addition to constitutional guarantees afforded commercial speech, commercial information and advertising are vital components of a market economy and necessary for informed economic decision-making by recipients of the information. Although the respondents publish materials deemed commercial, most publications today, as in the past, contain both commercial and non-commercial information. The symbiotic relationship between commercial and non-commercial publications and information makes it impossible for government officials to adopt workable and objective distinctions between supposedly separable forms of speech.

Petitioner alleges that the ruling below creates a split among various courts of appeals over interpretation of the test for commercial speech set forth by this Court. Cases alleged by petitioner to be in direct conflict with the ruling below involved instances of recognizable and proven harm created by the distribution of commercial information. Outright prohibitions on commercial speech, not justified by clear evidence establishing harm associated with the speech, have been consistently held unconstitutional. Petitioner relies on unfounded aesthetic and safety concerns to justify its prohibition on the distribution of commercial information while simultaneously permitting identical methods of distribution of non-commercial materials to flourish.

Under current First Amendment jurisprudence, the ruling below adopts the proper test for commercial

speech restrictions. If the ruling below is overturned by this Court, constitutional protection for commercial speech will be seriously undermined. Recent decisions by this Court have signaled a drift away from landmark commercial speech decisions guaranteeing First Amendment protection to the dissemination of commercial information. This Court should reaffirm the central constitutional foundation of commercial speech and reject the plurality language of *Metromedia Inc. v. City of San Diego*.

ARGUMENT

I. PETITIONER'S COMPLETE BAN ON THE DISTRIBUTION OF COMMERCIAL PUBLICATIONS ON PUBLIC PROPERTY CONFLICTS WITH CORE FIRST AMENDMENT VALUES THAT PROVIDE VIGILANT PROTECTION TO THE FREE FLOW OF COMMERCIAL INFORMATION NECESSARY FOR THE FUNCTIONING OF A FREE ECONOMY

Were the City of Cincinnati to ban all non-commercial newspaper distribution on public property, such a regulation would be declared a violation of the First Amendment. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (finding city newspaper licensing ordinance unconstitutionally vested discretion in city official); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991); see also, *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984). Cincinnati has attempted, however, to adopt such a blanket prohibition on all commercial materials. The City conceded that it could not distinguish commercial from non-commercial

newsracks. Instead, the petitioner offers the supposed lesser protection afforded to commercial speech under the First Amendment as a justification for the prohibition. Petition for Writ of Certiorari at 11.

Contrary to the City's assertions about the place of commercial speech in constitutional jurisprudence, this Court has granted First Amendment protection to commercial speech in many instances. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Furthermore, this Court has recognized the importance of commercial speech to not only the producers of such information, but also to the recipients of the commercial message. *Virginia Citizens* noted that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Citizens*, 425 U.S. at 763.

The respondents in the instant case publish materials that advertise "learning programs, recreational opportunities, . . . social events for adults . . . [and] residential real estate for sale or rent." *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 465-66 (6th Cir. 1991). The information provided by these publications, and other commercial publishers, to the citizens of Cincinnati has a significantly more direct impact on the every-day lives of those citizens than the reporting of the important, yet distant, events in Bosnia or the Commonwealth of Independent States contained in non-commercial and fully protected publications.

Commercial information and advertising are also vital components of a free enterprise economy:

advertising is a characteristic of competition – a means of entry into markets, a vehicle for price reduction, and a benefit to consumers. In this role it is part and parcel of a rivalrous competitive process with profound implications for the functioning of a market economy.

Ekelund and Saurman, *Advertising and the Market Process* 127 (1988). By prohibiting the distribution of commercial literature, the City is depriving individuals of a vital source of information necessary for rational economic decision-making.

The appeals court noted the traditional delineation between commercial and non-commercial speech made by this Court. *Discovery Network*, 946 F.2d at 467 n.4. Nevertheless, the appeals court also found it "somewhat anomalous," especially in the context of the instant case, "to denominate as non-commercial institutions such as the *New York Times* and Gannett (publisher of the *Cincinnati Post*), each of which has assets and revenues in the billions of dollars, and profits in the many millions of dollars." *Id.* Furthermore, newspapers today, as in the past, contain both commercial and non-commercial information. There is no consistent or objective line that separates the commercial from the non-commercial purpose of the newspaper. Stories reporting the latest political imbroglio appear amidst various commercial advertisements as they have since the colonial days of this country. J. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Pol'y Analysis, Cato Inst., Sept. 23, 1991, at 9-10. (noting that the

"colonial press printed advertisements of personal wants, announcements of rewards for the return of runaway slaves, and information on the scheduled sailing of ships"); See, Emord, *Freedom, Technology, and the First Amendment* (1991). Commenting on the interconnectedness in this country between commercial and non-commercial publications, Alexis de Tocqueville observed:

In France, the space allotted to commercial advertisements is very limited; . . . the essential part of the journal is the discussion of the politics of the day. In America, three quarters of the enormous sheet are filled with advertisements, and the remainder is frequently occupied by political intelligence or trivial anecdotes. . . .

Democracy in America 93 (R. Heffner, ed. 1956).

Describing the past and present contents of newspapers is not to say that "pure" speech and commercial speech in newspapers are "inextricably intertwined." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989). It is theoretically possible to separate commercial from non-commercial publications. However, the heavy commercial content of today's newspapers and the increasing politicalization of advertising (such as "Buy American" and "environment-friendly" ads) makes it impossible for city officials to make principled and constitutional distinctions between commercial and non-commercial publications.

II. THE UNITED STATES COURTS OF APPEALS HAVE CONSISTENTLY APPLIED THE *CENTRAL HUDSON* TEST FOR COMMERCIAL SPEECH TO STRIKE DOWN BLANKET PROHIBITIONS ON SPEECH IN THE ABSENCE OF REASONED AND PROVEN JUSTIFICATIONS FOR THE RESTRICTIONS

The City of Cincinnati, in its petition for certiorari, greatly exaggerates the alleged split between the Sixth Circuit and Eleventh and Seventh Circuits in their treatment of commercial speech in general and the fourth prong of the *Central Hudson* test in particular. The cases from the Eleventh and Seventh Circuits on which petitioners rely are distinguishable from the instant case on their facts and do not conflict with the Sixth Circuit's interpretation of the *Central Hudson* test. Indeed, the Eleventh Circuit has recently held that outright prohibitions on commercial speech, such as the one in the instant case, do not meet the "reasonable" fit requirements of the fourth prong of the *Central Hudson* and *Fox* tests. *Fane v. Edenfeld*, 945 F.2d 1514 (11th Cir. 1991), discussed *supra*.

The Eleventh Circuit case alleged to be in conflict with the Sixth Circuit's decision is *Don's Porta Signs v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987). The appeals court in *Don's Porta Signs* upheld a city ordinance that effectively banned the use of portable signs. The city submitted evidence that the portable signs themselves posed unique safety and aesthetic problems and were particularly unattractive. *Id.* at 1053. The court concluded that prohibition of these types of signs satisfied the *Central Hudson* test. *Id.*

The instant case is readily distinguishable from the facts of *Don's Porta Signs*. Both the City Architect and Engineer for Cincinnati conceded at the district court level that the commercial and non-commercial racks in question were alike in all respects. Yet in *Don's Porta Signs*, it was the particular unattractive nature of the portable signs that led to their constitutional prohibition. Additionally, the City of Clearwater submitted evidence to the court on the aesthetically unappealing attributes of portable signs. Cincinnati, however, produced no evidence of any harmful qualities or effects unique to the commercial racks. In fact, the Sixth Circuit admitted that "[h]ad Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, . . . the ordinance may have been constitutional." *Discovery Network*, 946 F.2d at 472 n.12. Unsupported legislative declarations that commercial racks pose particular dangers to safety and aesthetic concerns of the city do not pass constitutional muster. See *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1976).¹

¹ As this Court noted in *Erznoznick*, 422 U.S. at 216 n.13, municipalities can reasonably exercise their police power, in a manner that does not trample First Amendment rights, in order to regulate any harmful effects posed by constitutionally protected expression. In *Discovery Network*, 946 F.2d at 472, the appeals court noted a number of options Cincinnati could pursue to "control the perceived ill effects of newsracks apart from banning those dispensing commercial speech." The city could mandate fastening racks to sidewalks to alleviate safety concerns and establish color and design limitations upon all newsracks to satisfy aesthetic concerns. While it is within the legislative domain to determine the most reasonable alternatives, courts must guarantee that the legislature does not make unconstitutional content-based determinations.

Moreover, the Eleventh Circuit recently struck down a blanket prohibition on in-person solicitation by Certified Public Accountants (CPAs) as violative of the First Amendment. *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), petition for cert. filed, No. 91-1594. The appeals court noted that "[b]lanket prohibitions on commercial speech are disfavored." *Id.* at 1517; see also *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). Like the Sixth Circuit's decision regarding commercial distribution racks in *Discovery Network*, the Eleventh Circuit found the commercial speech restriction on CPAs to violate the fourth prong of the *Central Hudson* test. *Fane*, 945 F.2d at 1518.

The Board of Accountancy in *Fane* produced no "evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." *Id.* The ban on solicitation therefore failed the "reasonable" fit test as mandated by *Central Hudson* because the statute "bans far more speech than is necessary in light of the justification offered for its restraint." *Id.* Likewise, the Sixth Circuit determined that Cincinnati's complete prohibition on commercial newsracks bans far more speech than necessary given the lack of justification provided by the city and thereby fails under the *Central Hudson* calculus. According to both the Eleventh and Sixth Circuits, government officials can employ legitimate police powers to combat potential aesthetic and safety problems but they cannot use their "interest in foreclosing harm to justify broad-scale restraints on speech." *Fane*, 945 F.2d at 1518.

The City of Cincinnati also cites the Seventh Circuit's decision in *Chicago Observer, Inc. v. City of Chicago*, 929

F.2d 325 (7th Cir. 1991), as another indication of the supposed split among circuits arising from *Discovery Network*. Petition for Writ of Certiorari at 7. In *Chicago Observer, id.*, the appeals court upheld an ordinance regulating the size of advertisements on newsracks. The ordinance was directed at eliminating particularly offensive and distracting "AD BOXes" attached to standard newspaper racks. Similar to the portable signs described in *Don's Porta Signs*, 829 F.2d 1051 (11th Cir. 1987), the "AD BOX" posed particular aesthetic and safety concerns for the City of Chicago.

In petitioner's attempt to characterize *Chicago Observer* as conflicting with *Discovery Network*, its precentential sleight of hand becomes apparent. As the petition for certiorari concedes, Petition for Writ of Certiorari at 8, the ordinance adopted by Chicago "significantly" banned "off-premises" ads. The Seventh Circuit hastened to point out, however, that the "government must leave [open] ample channels for communication," and that standard was met because "Chicago teems with ads and with publications that do not need 'AD BOXes' for distribution." *Chicago Observer*, 929 F.2d at 328. Of course, Cincinnati has prohibited all means of distributing commercial information on public property even though the commercial distribution racks in Cincinnati posed none of the problems associated with the commercial advertisements in either *Don's Porta Signs* or *Chicago Observer*.

III. THIS COURT SHOULD REAFFIRM THE CENTRAL CONSTITUTIONAL FOUNDATION FOR COMMERCIAL SPEECH JURISPRUDENCE BY REJECTING THE PLURALITY LANGUAGE OF *METROMEDIA* AND HALTING THE DILUTION OF CONSTITUTIONAL PROTECTION FOR COMMERCIAL SPEECH

Since the supposed circuit court split alleged by petitioners is in fact illusory, the remaining basis for this Court to reverse the judgment of the appeals court is to transform the plurality language in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), into a majority rule. A transformation of the plurality holding in *Metromedia* to a majority rule would amount to a serious assault on the constitutional protections afforded commercial speech and cast the future of First Amendment protection for commercial speech into doubt.

In *Metromedia, id.*, a plurality of this Court, in striking down a ban on off-site, outdoor signs carrying non-commercial advertising, stated that the ban would be permissible as it applied to commercial speech. The appeals court in the instant case admitted that had a majority of this Court upheld "San Diego's statute as a permissible regulation of commercial speech, we would be compelled to reverse the district court." *Discovery Network*, 946 F.2d at 470, n.9. *Amicus* urges this Court to repudiate the plurality holding in *Metromedia* by adopting the test for commercial speech restrictions set forth by this Court and adhered to by the appeals court in *Discovery Network*.

Under current law, commercial speech can be regulated only when the regulations address speech believed

to be inherently false or misleading,² or deal with the distinctive effects the content of the speech will produce.³ In the instant case, the City is "attempting to place a burden on a particular type of speech because of the harms caused by the manner of delivering that speech." *Discovery Network*, 946 F.2d at 471 (emphasis in original). In the absence of efforts to alleviate particular harms caused by the actual content of a commercial publication, this Court reviews "with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Central Hudson*, 447 U.S. at 566 n.9. An adoption of the plurality language in *Metro-media* would sanction the pursuit of government policy objectives at the expense of fundamental First Amendment rights.

Transforming *Metromedia* into a majority ruling would seriously erode the constitutional protection granted to commercial speech and significantly undermine this Court's ruling in *Virginia Citizens*. This Court recognized in *Virginia Citizens* not only the constitutional imperative that commercial-speech be granted protection, but also the individual and societal benefits that flow from accessible commercial information. *Virginia Citizens*, 425 U.S. at 763-64. As this Court noted:

² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

³ *Renton v. Playtime Theaters*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *California v. LaRue*, 409 U.S. 109 (1972).

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

This Court should reaffirm the central and landmark holding of *Virginia Citizens* that commercial speech is unquestionably protected by the First Amendment. Two recent decisions of this Court⁴ called into question the continued vitality of *Virginia Citizens* and the strength of constitutional protections for commercial speech. In both cases, this Court weakened the test set forth in *Central Hudson*. See *Kurland, Posadas de Puerto Rico Associates v. Tourism Company: 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful*, 1986 Supreme Court Law Review 1; McGowan, *A Critical Analysis of Commercial Speech*, 78 Calif. L. Rev. 359 (1990).

In *Posadas*, this court upheld a statutory ban by Puerto Rico on casino advertising to Puerto Rican citizens. The effect of the majority decision is to grant broad powers to legislative bodies in determining the means/

⁴ *Fox*, 492 U.S. 469 (1989); *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

end fit in commercial speech regulation. One commentator noted that under *Posadas*:

there is no advertising that is not subject to government censorship. Truthful [commercial speech concerning a lawful activity] may thus be made illegal at the discretion of any bureaucrat with legislative license drawn as in broad terms as that given in . . . *Posadas*.

Kurland, *supra*, at 1, 13.

In *Fox*, 492 U.S. 469 (1989), this Court held that the fourth prong of the *Central Hudson* test only requires that there be a "reasonable" fit between the substantial governmental interest and the means chosen to advance that interest (as opposed to the government having to choose the "least restrictive means"). While *amicus* believes that the Cincinnati ordinance fails even under the relaxed standard of *Fox*, an adoption of the *Metromedia* language would dilute judicial review of commercial speech ordinances to virtually a rational basis standard. If Cincinnati's ban on commercial speech, completely lacking in any reasoned justification, is upheld, virtually any regulation of commercial speech could pass constitutional muster.

We urge this Court to halt this alarming drift by rejecting the plurality holding in *Metromedia* and affirming the judgment of the appeals court in the instant case. The constitutional arguments are too strong and the individual and societal interests too great to relegate commercial speech to negligible constitutional protection.

CONCLUSION

For the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court affirm the opinion below.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CITY OF CINCINNATI,
v. *Petitioner,*
DISCOVERY NETWORK, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF AMICI CURIAE OF
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J. Trenchard & T. Gordon, <i>Cato's Letters No. 15</i> , quoted in D. Bogen, <i>The Origins of Freedom of Speech and Press</i> , 42 Md. L. Rev. 429 (1983)	21
W. Walsh, <i>A History of Anglo-American Law</i> (1932)	22
J. Wood, <i>The Story of Advertising</i> (1958)	16
L. Wroth, <i>The Colonial Printer</i> (1938)	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1200

CITY OF CINCINNATI,
v. *Petitioner,*

DISCOVERY NETWORK, INC., *et al.,*
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**BRIEF *AMICI CURIAE* OF
AMERICAN ADVERTISING FEDERATION,
AMERICAN ASSOCIATION OF ADVERTISING
AGENCIES, DIRECT MARKETING ASSOCIATION,
THE MEDIA INSTITUTE, AND
NATIONAL ASSOCIATION OF BROADCASTERS
IN SUPPORT OF RESPONDENTS**

This brief is respectfully submitted, pursuant to Rule 37 of the Rules of the Court, urging affirmance of the decision below of the United States Court of Appeals for the Sixth Circuit on the grounds that the ordinance at issue herein impermissibly discriminates against truthful commercial speech, and that the First and Fourteenth Amendments to the Constitution of the United States therefore bar Petitioner's action.¹

¹ Counsel for both Petitioner and Respondents have consented to the participation of *amici* in this case, as evidenced in letters filed with the Court.

INTEREST OF *AMICI CURIAE*

Together, the *amici* herein represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. The precedent set by this case could directly affect the constitutional interests of the *amici* both by curtailing the outlets for truthful commercial speech about lawful products and services and by undermining the financial ability of the *amici* to engage in fully protected, noncommercial speech. *Amici* are:

- The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use almost all forms of media to advertise and communicate with consumers throughout the United States.
- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, which represents more than 750 advertising agencies located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively

represented its members in connection with governmental efforts to restrict speech.

- The Direct Marketing Association ("DMA"), a non-profit corporation. DMA is the oldest and largest trade association serving the vast community in direct-to-the-consumer advertising and marketing. Its members are firms engaged in or associated with marketing goods and services through direct response methods, which include the use of catalogs and other printed materials distributed directly to consumers.
- The Media Institute (the "Institute"), an independent, non-profit research organization that advocates a strong First Amendment. The Institute has participated in select cases in federal circuit courts and the U.S. Supreme Court. In addition, it conducts research projects and sponsors publications relating to the First Amendment and other aspects of the communications media. The advocacy of the Institute here is unrelated to any of the financial or proprietary interests of the private-party participants.
- The National Association of Broadcasters ("NAB"), organized in 1922, which is a non-profit incorporated trade association serving and representing the nation's radio and television stations and all of the major networks. A substantial amount of the advertising broadcast by NAB members is national in scope and crosses state jurisdictional boundaries. In fact, because of the nature of the electromagnetic spectrum, individual station transmissions of local and national advertising cannot be confined within state boundaries.

SUMMARY OF ARGUMENT

As demonstrated at length in the opinion of the Sixth Circuit and the brief of Respondent Discovery Network, Inc., Cincinnati's newsrack ordinance cannot be upheld under the standards set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). In particular, the city has failed to demonstrate a "reasonable fit" between its goal of advancing health and safety and the means it has employed to achieve that goal—i.e., in an effort to remove a tiny percentage of Cincinnati's newsracks, it has imposed a sweeping ban on the distribution of certain types of speech, based solely on its commercial content.

Amici respectfully suggest, however, that the Court go beyond a conventional *Central Hudson* analysis and use this case to give fresh consideration to the basic premises of its treatment of commercial speech. Specifically, *amici* urge that the Court make clear that truthful commercial messages about lawful products and services are entitled to a full measure of constitutional protection. This approach would be: (1) consistent with the *outcome* in every Supreme Court case involving such speech since it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), with a single errant exception;² and (2) fully in accord with the original understanding of the First Amendment, as reflected in its text and surrounding historical circumstances.

Moreover, such a determination would eliminate much of the confusion and inconsistency that now characterizes efforts by the lower courts to implement *Central Hudson's* subjective "balancing" test. In accord with these principles, the decision of the Sixth Circuit should be affirmed and the regulation in question invalidated.

² The exception is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which rested on a narrow 5-4 majority and has been subjected to intense academic criticism. See *infra* note 6.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS DISCRIMINATION AGAINST TRUTHFUL, NON-MISLEADING COMMERCIAL MESSAGES.

In *Virginia Pharmacy*, this Court properly recognized that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent opinion as to how that system ought to be regulated." 425 U.S. at 765. Since that time, however, the Court has adopted the four-part *Central Hudson* "balancing" test which goes beyond the questions of whether a commercial message is truthful and non-misleading and whether it concerns a lawful product or service. In its most recent iteration, that test seeks to assess whether the asserted governmental interest justifying the regulation is "substantial"; whether the regulation "directly advances" that interest; and whether it does so in a manner that is a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

Fortunately, in the decisions of the Court to date, this test has led to *results* that are consistent with a grant of full First Amendment protection to truthful advertising of lawful products and services. Accordingly, the approach advocated in this brief would not require substantial modification of previously approved governmental policies. More importantly, however, the proposed analysis would avoid the danger of unlawful censorship that will exist so long as commercial messages are formally subjected to a reduced level of constitutional protection—where the outcome of each case turns on the subjective evaluations of individual administrators, legislators, and judges. In addition, the adoption of a categorical approach would eliminate much of the confusion and inconsistency that has marked efforts by the lower courts to implement the existing four-part "balancing" test.

A. The Court's Jurisprudence Is Largely in Accord with the View That Truthful Commercial Messages Are Fully Protected by the First Amendment.

Virginia Pharmacy, 425 U.S. at 755, marked a recognition by the Court that, contrary to its previous statement in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), "purely commercial advertising" is entitled to constitutional protection. In *Valentine*, the Court had upheld a ban on the distribution in the streets of commercial advertising matter, 316 U.S. at 53. *Virginia Pharmacy*, however, thoroughly undercut *Valentine*.

Matters have now come full circle. As in *Valentine*, the Court will decide in this case whether a sweeping ban on the distribution of advertising materials in a public place is permissible. *Amici* urge the Court to reject such regulatory actions and to reaffirm the principle that truthful commercial messages may not be banned or regulated merely because they are commercial in nature.

1. *The outcome of the Court's decisions since Virginia Pharmacy, has, in every case but one, been consistent with the principle that truthful commercial messages about lawful products are entitled to a full measure of constitutional protection.*

This Court's commercial speech decisions since *Virginia Pharmacy* have generally upheld restrictions which ostensibly prevented consumers from being misled—while striking down numerous regulations on commercial communications which were designed to advance other purported governmental interests. For example, in *Friedman v. Rogers*, 440 U.S. 1 (1979), the Court upheld a statute banning the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public." *Id.* at 13. And in *Zauderer v. Off. of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court approved a requirement that attorneys inform the public that they may be responsible for costs, if not legal fees,

if they hire a lawyer on a contingent fee basis: "We hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted).³

In *Ohralik v. Ohio State Bar Ass'n*, the Court noted "the common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech." 436 U.S. 447, 455-56 (1978). That distinction, embedded in the common law, permits broader regulation of the content of advertising to ensure its veracity. *See infra* pages 22-24.⁴ Such regulations, however, are subject to review by the courts to ensure that the government is not using its police power to define commercial fraud and misrepresentation as a pretext to punish or censor truthful and lawful (protected) communications. In fact, this Court has fulfilled precisely such a role in most of its commercial speech cases.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), exemplifies this approach. There, the Court held unconstitutional a statute prohibiting the mailing of unsolicited advertisements for contraceptives. It recognized that "regulation of commercial speech based on content is less problematic . . . [i]n light of the greater potential for deception or confusion in the context of certain advertising messages." *Id.* at 65. However, because the information provided by the advertisements was not misleading but informative, the messages were protected.

³ Similarly, the ban on in-person solicitation by lawyers upheld in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), was found to be constitutional because it prevented attorneys from taking commercial advantage of prospective clients who may be misled or deceived in the proposed transaction.

⁴ For the purposes of this brief, it is assumed *arguendo* that the Court was correct in its decisions upholding restrictions on commercial speech asserted to be false or misleading. However, *amici* do not necessarily agree that the commercial communications at issue in each of these cases can fairly be characterized as having been false or misleading.

In fact, the majority of the Court's commercial speech decisions have recognized the value of truthful commercial speech. Thus, in *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), the Court overturned the censure of an attorney who had stated on his letterhead that he had been certified as a civil trial specialist. Justice Stevens' plurality opinion reaffirmed the Court's commitment to "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Id.* at 108. Similarly, in *Zauderer*, 471 U.S. at 647, the Court invalidated the reprimand of an attorney who had solicited business by running newspaper advertisements containing non-deceptive illustrations and legal advice.⁵

2. The Central Hudson "balancing test" is susceptible to decisions inadequately protective of commercial messages; it also causes confusion among the lower courts.

In explaining its actions, however, the Court has departed from this approach by frequently reiterating a broad assertion that "the Constitution . . . accords a lesser

⁵ See also, e.g., *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (truthful, nondeceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *In re R.M.J.*, 455 U.S. 191 (1982) (rule limiting dissemination of truthful advertising violated First Amendment); *Central Hudson*, 447 U.S. 557 (1980) (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (truthful attorney advertising constitutionally protected); *Carey v. Population Services International*, 431 U.S. 678 (1977) (law restricting advertising of contraceptives violated First Amendment since it did more than limit misleading or deceptive speech); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance prohibiting "for sale" signs violated First Amendment because it inhibits free flow of truthful information); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (editor could not be prosecuted for running non-deceptive advertisement for a legal service).

protection to commercial speech than to other constitutionally guaranteed expression," *Bolger*, 463 U.S. at 64-65, and by following the four-part *Central Hudson* test.

As the Court of Appeals demonstrated and as the brief of Respondent demonstrates, the City of Cincinnati has not shown that the ordinance at issue satisfies the requirements of this test. See, e.g., *SUNY v. Fox*, 492, U.S. at 480 (party seeking to uphold restriction on commercial speech carries burden of justifying it.). A total ban on all commercial newsracks does not accomplish the goal of beautifying the city where the number of newsracks that would be removed by enforcement of the ordinance is only sixty-two out of 1,500-2,000. In the words of the Sixth Circuit, "the burden placed on [Discovery] by Cincinnati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance." *Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464, 471 (1991), cert. granted, 112 S. Ct. 1290 (1992).

The city's contention that a restriction on speech is valid as long as it furthers the asserted governmental interest to any extent, however "paltry" or "minuscule," Brief of Petitioner at 20, misconstrues *SUNY v. Fox*. A requirement that a regulation be a "reasonable fit" quite plainly calls for an assessment of the relative benefits and burdens of the restriction on speech, as well as for a judgment about the appropriateness of the law to the problem sought to be averted. Here, both the Court of Appeals and the District Court correctly found that the aesthetic value and the effect on safety of removing 3-4% of the newsracks from the streets did not justify an outright ban on the distribution of commercial speech.

Moreover, as shown at length below, there is no textual or historical justification for the *Central Hudson* test itself. This Court was correct in *Virginia Pharmacy* when it extended First Amendment protection to "concededly truthful information about entirely lawful activity." 425 U.S. at 773. The *Central Hudson* test, which was devel-

oped later (based, in part, on the penultimate footnote in the majority opinion in *Virginia Pharmacy*, *id.* at 771-72 n. 24), has led at times to results that are clearly inconsistent with the spirit of *Virginia Pharmacy* itself.

Most significantly, *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), illustrates the perils of utilizing a commercial speech standard that is as subjective as the *Central Hudson* test. In *Posadas*, the Court upheld Puerto Rico's restriction on advertising of casino gambling aimed at residents of Puerto Rico. Applying *Central Hudson*, the Court concluded that Puerto Rico's "substantial" interest in "reduc[ing] demand for casino gambling by the residents of Puerto Rico" was "directly advanced" by limiting the availability of such advertising to the inhabitants of Puerto Rico. *Posadas*, 478 U.S. at 341. The Court attempted to buttress its opinion in *Posadas* by contending that the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345-46.⁶

A major flaw in this analysis is that it can be employed by proponents of regulation in an effort to justify restrictions on a wide variety of commercial messages. To illustrate, numerous products—from foods high in fat,

⁶ This argument has been widely criticized. See, e.g., A. Kozinski & S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); M. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433 (1990); P. Kurland, *Posadas de Puerto Rico v. Tourism Co.*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful'", 1986 Sup. Ct. Rev. 1. It was also repudiated in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat ['greater-includes-the-lesser'] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

sugar, salt, or nitrates to large-engine cars—have been accused of creating dangers to the public welfare and, arguably, could be banned by Congress or state legislatures.⁷ Accordingly, the state's interest in "discouraging" the use of any of these products could be characterized by supporters of regulation as "substantial." Furthermore, as in *Posadas*, proponents of regulation can be expected to contend that a ban on advertising such products would "directly advance" the state's interest in dissuading consumers from using them—in the hope that an extremely broad array of advertising would be left open to censorship.⁸ It is clear, however, that this Court has not accepted such a broad interpretation of *Posadas*, as evidenced by its more recent decision on commercial speech in *Peel*, 496 U.S. 91.⁹

⁷ Cf. *Friends of Earth v. F.C.C.*, 449 F.2d 1164, 1169 (D.C. Cir. 1971) ("The distinction [between cigarettes and gas-guzzling cars] is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger."), *cert. denied*, 436 U.S. 926 (1978).

⁸ In addition, there is no evidence to support the view that a ban on advertisements would generally discourage the consumption of the advertised product or service. Advertising has been shown to have an effect on brand loyalty only.

⁹ Although *SUNY v. Fox*, 492 U.S. 469, employs the *Central Hudson* analysis as well, it is perhaps best understood—and perhaps should have been analyzed—as a right of access case involving a rule of general applicability affecting many business activities in addition to commercial speech. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981) (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). Unlike Cincinnati's ordinance, the general ban on most commercial activities on campuses at issue in *SUNY v. Fox* did not directly discriminate against certain forms of speech. Rather, its broad purpose was to keep certain businesses out of university campus dormitories. Also, unlike streets, it is not at all clear that college dormitories fall into the category of a traditional public forum. Cf. *Perry Ed. Assn. v. Perry Local Educators Ass'n*, 460 U.S. 37, 44 (1983) (internal school mailboxes do not constitute a public forum).

A second flaw in the *Posadas* analysis (and the *Central Hudson* test) is that it has caused confusion among the lower courts.¹⁰ Such inconsistencies are an inevitable consequence of asking individual judges to assess the "substantiality" of an interest and weigh it against the degree of impingement on otherwise protected speech.

Balancing tests, by their very nature, tend to promote unprincipled decision-making, confusion, and judicial inconsistency. As such, although "we will have ... balancing modes of analysis with us forever[,] ... those modes of analysis should be avoided where possible." A. Scalia, *The Rule of Law as A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989). "Balancing" tests such as the *Central Hudson* analysis too easily permit judges to "mistake their own predilections for the law." A. Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989); see also Scalia, *Rule of Law*, 56 U. Chi. L. Rev. at 1178. Especially when dealing with First Amendment freedoms, "the use of ... traditional legal categories is preferable to the sort of ad hoc balancing that the Court" performs under the *Central Hudson* analysis. *Simon and Schuster, Inc. v. New York State Victims Crime Board*, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring). The problems inherent in the *Central Hudson* balancing test could largely be avoided if truthful commercial messages concerning lawful products or services were accorded the same constitutional protection (and subject to the same regulation) as other forms of speech.

¹⁰ Compare, e.g., *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986) (state law prohibiting placement of alcohol-advertising signs on shopping carts constitutional) with *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) (certain ordinances prohibiting maintenance of off-premises signs unconstitutional); *Ackerly Communications of Massachusetts v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional).

B. The Original Understanding of the First Amendment, When Read with the Common Law of 1791, Confirms That Truthful Commercial Messages Are Entitled to Full First Amendment Protection.

This conclusion—that truthful messages about lawful products or services are entitled to full protection—is also consistent with the original meaning of the First Amendment.¹¹ The Press Clause, when read against the background in 1791, confirms that, while government may limit commercial messages concerning lawful products to avoid potentially false or misleading claims, such speech is not in other respects subject to a reduced level of constitutional protection.

"[T]he true meaning [of the freedom of the press] as understood by the nation at the time of its ratification" prohibits discrimination against commercial communications merely because they are commercial. Letter of J. Madison to John G. Jackson (Dec. 21, 1821) reprinted in *9 Writings of James Madison* at 70, 74 (G. Hunt, ed., 1819-36) (emphasis in original).¹² Indeed, it shows that the development of the concept of a free press and of a commercial, advertising-driven press were inextricably linked. V. Crane, *Benjamin Franklin's Letters to the Press, 1758-1775* xvi (1950) ("It was a commercial age, and it produced a commercial press."). As a result, the

¹¹ Whether or not one believes that the text and history of the Constitution determine the outcome of a particular case, the original understanding of the Constitution's terms is without question relevant to any attempt to interpret the Constitution. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting); *Perpich v. Dep't of Defense*, 110 S. Ct. 2418, 2422-23 (1990).

¹² See also *White v. Illinois*, 112 S. Ct. 736, 744-48 (1992); (Thomas, J., concurring) (Sixth Amendment should be construed in a manner consistent with the Amendment's "text and history"); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (discussing the "historical record" of the Full Faith and Credit Clause in order to discern its "original understanding").

modern distinction between "commercial" messages and other forms of speech would simply never have occurred to colonial Americans. At the same time, it is clear that the common law rules limiting misrepresentation survived the adoption of the Bill of Rights. Thus, the First Amendment permits the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.

The strongest support for the view that truthful, non-misleading speech about lawful matters is entitled to a full measure of constitutional protection is the text of the Press Clause itself, which does not distinguish between advertisements and other types of messages. Absent specific evidence to the contrary, then, it should be presumed that the original meaning of "the freedom . . . of the press" encompasses all elements of the press, including advertising. Indeed, there is much historical evidence demonstrating that the "press" which the Framers wanted to remain forever free included commercial advertisements.

Certainly, colonial Americans did not distinguish between the types of messages warranting protection from governmental interference. As one contributor writing under the pseudonym "Philalethes" declared in Boston's *Herald of Freedom* in 1788, Americans "are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on *every* subject, constitutes the dignified character of Americans." Boston *Herald of Freedom*, September 15, 1788 (emphasis added).¹³

¹³ Quoted in J. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 19 (1988). When *The New-Hampshire Gazette* was launched in 1756, its publisher said that the paper would "contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and

It is clear, moreover, that the "press" which the Framers specifically sought to protect encompassed communication concerning commercial matters. As Richard Henry Lee of Virginia, perhaps the leading Anti-Federalist, said in his demand for a bill of rights, "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI, January 20, 1788, in *An Additional number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added).¹⁴

1. *Advertising was an integral part of the "press" in colonial America.*

In the press of the Eighteenth Century, editorial and advertising content were inextricably linked. For much of that era, newspapers did not generally use layout techniques or differences in typeface to provide a visual distinction between the two. K. Middleton, *Commercial Speech in the Eighteenth Century in Newsletters to Newspapers: Eighteenth-Century Journalism* 281 (D. H. Bond & W. R. McLeod, eds., 1977). Moreover, the standard colonial newspaper was almost half-filled with local advertising. L. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New-York Mercury* was 70% advertising, and 55% of the *Royal Gazette* consisted of commercial matter. A. Lee, *The Daily Newspaper in America* 32 (1937).

other useful Arts, and promote the public Welfare in any Respect." New Hampshire Gazette, October 7, 1756, quoted in Smith, *supra*, at 49 (1988) (emphasis added). True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy.

¹⁴ Reprinted in *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy, ed., 1966). Among the goals of the first attempted colonial newspaper in 1690 was the promotion of "Business and Negotiations." PUBLICK OCCURRENCES, Both Foreign and Domestick, September 25, 1690, quoted in F. Presbrey, *The History and Development of Advertising* 119 (1929). This newspaper was suppressed by governmental authorities after its first issue.

The first daily newspaper in the United States was established in 1784 as a result of pressure for advertising space. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with ads. F. Presbrey, *The History and Development of Advertising* 161 (1929). As with several other newspapers of the period, the name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day as reports of government activity.¹⁵ The front pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. F. Mott, *American Journalism A History: 1690-1960* 157 (1963) ("Most dailies in these years used page one for advertising, sometimes saving only one column of it for reading matter."); see also J. Wood, *The Story of Advertising* 85 (1958).

The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." Middleton, *supra*, at 277. ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."). Often newspapers simply carried long lists of general merchandise without prices or descriptions. Mott, *supra*, at 58. Without these ads, the vibrant colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56.

¹⁵ See also Presbrey, *supra*, at 154 ("Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.").

2. The colonial conception of a "free press" included advertising.

Given the prevalence of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising.¹⁶ In fact, one of the best-known statements in defense of a free press was written in response to an attack on an advertisement printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply "propose[d] a commercial transaction," *Virginia Pharmacy*, 425 U.S. at 760, by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers* (1731), reprinted in *2 Writings of Benjamin Franklin*, 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his "Apology for Printers" which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, *Printers and the American Revolution in The Press and the American Revolution* 20 (B. Bailyn & J. B. Hench, eds., 1980). Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's "Apology" contended that "Printers are educated in the Belief that when Men

¹⁶ Although the first regularly published American weekly newspaper, the *Boston News-Letter* of May 1-8, 1704, also contained the first paid advertisements, it took about fifteen years for Benjamin Franklin and his brother James to come "into journalism and sow[] the seed of a free press and an expansion of advertising." Presbrey, *supra*, at 131; see also Mott, *supra*, at 11.

differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick."¹⁷ This incident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of commercial speech.¹⁸

One of the major precipitating events of the American Revolution also involved a defense of advertisements. The Stamp Act of 1765 taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. J. Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).¹⁹ The repeal of the Stamp Act

¹⁷ This echoed the sentiment in the libertarian *Cato's Letters*, published from 1720-1724 and widely circulated in the colonies, that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." J. Trenchard & T. Gordon, 3 *Cato's Letters* 295 (1733). These letters were "the most popular, quotable, esteemed source of political ideas in the colonial period." C. Rossiter, *Seedtime of the Republic* 141 (1953). Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

¹⁸ John Stuart Mill expanded on this concept of a "marketplace of ideas" in *On Liberty* where he wrote that the "real advantage which truth has [is] that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until [eventually] it has made such head as to withstand all subsequent attempts to suppress it." J.S. Mill, *On Liberty* (1859), reprinted in *Utilitarianism and Other Writings* 155 (1970).

¹⁹ This concern rested to a certain extent on the history of stamp taxes in England. Such taxes had been introduced in that country

of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

Advertisements were not necessary to the press simply because the revenue they generated was required for newspapers to exist; they were thought to have independent value in educating and informing the reading public. As the prominent printer-historian Isaiah Thomas, editor of an ardently pro-Revolutionary newspaper, wrote:

[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810).²⁰

3. The Framers' political philosophy, which equated liberty and property, did not distinguish between commercial and noncommercial messages.

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "Liberty and Property

to replace the failed system of licensing printers. Thus, their express purpose had been to control and cripple the press. F. Siebert, *Freedom of the Press in England, 1476-1776* 306-321 (1952) ("[T]he principal objective of the first Stamp tax (10 Anne, cap. 18, 1712) was the control of 'licentious, schismatical, and scandalous' publications.").

²⁰ Quoted in D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958). Justice Blackmun echoed these words nearly two centuries later in *Virginia Pharmacy*, when he wrote:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the enjoyment of the other." Boston Gazette, February 22, 1768, *quoted in* Rossiter, *supra*, at 379. This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending upon the will of any other man." J. Locke, *Second Treatise on Government* ch. 2, § 4 (1790).

Proceeding from Locke's thesis, Cato wrote:

By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, so far as it hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys . . .

2 *Cato's Letters* 244-45.

Without question, this was the guiding philosophy of the Framers. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing Happiness and Safety." Va. Declaration of Rights § 1, *reprinted in* H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added).

Given this outlook, the current distinction between advertisements and other parts of the press would never have occurred to the Framers. They accepted the importance of freedom of expression and its inextricable link with property rights, which Cato had articulated as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." 1 *Cato's Letters* 965-103 (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, February 4, 1720).²¹

²¹ Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Smith, *supra*,

Eighteenth-century printers who published advertising-laden newspapers therefore believed that they were exercising the natural right to control their property. In fact, much of the opposition to the British Stamp Act of 1765 and the taxes it imposed on the press—including taxes on advertising—was based on their perceived offense to property rights. See Middleton, *supra*, at 280-81.

In keeping with this recognition that advertising was an inextricable part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no distinction between the commercial and noncommercial aspects of the press. The purpose of the Press Clause, as James Madison said when the First Amendment was reported out of the House select committee, was to "expressly declare" "the liberty of the press . . . to be beyond the reach of government." 1 *Annals of Congress* 738 (1789), *reprinted in* 5 *The Founders' Constitution* 129 (P. Kurland & R. Lerner, eds., 1987). There is simply no evidence that the First Amendment places "beyond the reach of government" just that part of it which contained political or other noncommercial speech.²²

at 25. In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. Cato's *Essay* contended that "Freedom of Speech is the Great Bulwark of Liberty; they prosper and die together." Cato's *Letters* No. 15, *quoted in* D. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983). Madison lifted Cato's phrase for his original draft of the First Amendment, which provided that "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall remain inviolable." 1 *Annals of Congress* 434 (1789), *reprinted in* 5 *The Founders' Constitution* 128 (P. Kurland & R. Lerner, eds., 1987).

²² In fact, the general theory of the First Amendment holding sway at the time applied it to much more than political speech. Among the reasons given by the Continental Congress to settlers in Quebec for the importance of the freedom of the press was "the

4. *The First Amendment did not displace the common law restricting false or misleading speech, which is not protected.*

That the "freedom of the press" includes advertisements does not mean, however, that false or misleading informative commercial speech is, or ever was, entitled to First Amendment protection. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979). The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. In the words of Sir William Blackstone, "every kind of fraud is equally cognizable . . . in a court of law." W. Blackstone, 3 *Commentaries on the Laws of England* 431 (1768). Justice Story treated that "old head of equity," the law of misrepresentation, in great detail. See J. Story, *Equity Jurisprudence* § 191 (1836). He described the basic rule as:

Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage; in every sense there is a positive fraud in the truest sense of the terms; there is an evil act with evil intent And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.

Story *supra* § 192; see W. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century).²²

advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1774), in B. Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971).

²² Similarly, the Court has consistently held that advertising promoting an unlawful product or service is unprotected. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). This comports with the common law, which considered it a criminal offense to "procure, counsel, or command another to

Thus, the Court has correctly noted that there is "a distinction between commercial and noncommercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1978). Properly understood, however, that distinction should simply be as follows: the veracity of commercial speech may be policed, whereas the government's ability to regulate "false" or misleading political speech is far more constrained.²⁴ This distinction avoids the "dilution" which this Court has said would be "invited" were "a parity of constitutional protection for commercial and noncommercial speech alike" required. *Ohrlik*, 436 U.S. at 556.²⁵

There is no evidence that the First Amendment was intended to free advertisers to misrepresent their wares or to displace the common law regulating commercial transactions.²⁶ Thus, in defining misrepresentation, the legislature is carrying forward a common-law tradition

commit a crime." W. Blackstone, 4 *Commentaries on the Laws of England* 36 (1769) (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases.").

²⁴ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding unconstitutional "forced speech" with respect to political speech). But see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (false and defamatory speech may be punished because libelous).

²⁵ As such, regulation of false or misleading speech under laws such as the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988), is not unconstitutional.

²⁶ This does not mean that the First Amendment left the common law entirely untouched and unaffected. Most notably, the Court has adopted the view that the First Amendment prohibited prosecutions for seditious libel. See, e.g., *Whitney v. California*, 274 U.S. 357, 372-78 (1927) (Brandeis, J., concurring). See also Smith, *supra*, at 7-8; D. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455, 510 (1983).

which the First Amendment did not displace. However, the First Amendment does forbid the government from restricting commercial messages for illegitimate ends under the pretext of promoting a vague and generalized concept of "fairness" in every commercial transaction. See generally *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466. Nor would it permit an outright ban on all commercial communications on the grounds that they are somehow inherently misleading. Cf. *Virginia Pharmacy*, 435 U.S. at 766-69. Finally, as demonstrated below, it certainly would prohibit laws which discriminate against constitutionally protected publications merely because they contain commercial messages only—such as the ordinance at issue here.

II. BY DISCRIMINATING AGAINST CERTAIN PUBLICATIONS MERELY BECAUSE THEY ARE COMMERCIAL, THE CINCINNATI ORDINANCE VIOLATES THE FIRST AMENDMENT.

Under this analysis, Cincinnati's ordinance clearly violates the First Amendment because it places a special restriction on commercial messages for a reason other than to preserve their truth and veracity. The Cincinnati ordinance has nothing whatever to do with avoiding falsity. There is no contention in this case that Discovery Network's "expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*, 447 U.S. at 566 n. 9. Accordingly, the ordinance at issue should be subject to the same level of scrutiny as are regulations of fully protected speech; in other words, the Discovery Network's advertising circulars should be entitled to the same protection as are non-commercial messages. Employing this standard, the ordinance clearly fails because it rests on a content-based distinction that is entirely unrelated to the interests the city seeks to advance.²⁷

²⁷ This is not to say that the City of Cincinnati does not have a legitimate interest in promoting the safety and beauty of its streets. The problem here is that the means by which the city has chosen

This Court's case law clearly prohibits regulations of speech based on its content unless they serve a compelling state interest. See, e.g., *Burson v. Freeman*, No. 90-1056, slip op. at 15 (S. Ct. May 26, 1992) ("We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny.") (Blackmun, J., plurality opinion).²⁸ Without question, Cincinnati's ordinance, on its face, restricts the distribution of certain forms of information.²⁹ It is not a "generally applicable economic regulation to which the press can legitimately be subject." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Rather, like the discriminatory taxes struck down as unconstitutional in *Arkansas Writers and Minneapolis Star and Tribune Co. v. Comm.*

to accomplish those goals are unlawful. This case is therefore different from *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), where the government sought to avoid the secondary effects of activities that could only be defined by reference to a certain kind of speech. The effects of the newsracks banned by Cincinnati's ordinance have nothing whatever to do with the content of the publications contained within the newsracks. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2471 (1991) (state's interest in banning nude dancing arises from the "simple correlation" of such dancing with secondary evils, not from any relationship between the effects and "the expressive component of the dancing") (Souter, J., concurring).

²⁸ As Justice Kennedy pointed out in *Burson*, that a regulation is, arguably, "justified without reference to the content of the regulated speech" does not end the analysis. Slip op. at 2 (Kennedy, J., concurring) (emphasis and citations omitted). This case differs sharply from *Burson* because Cincinnati's justification for its ordinance is not "to protect another constitutional right"—e.g., voting. *Id.* at 3. In addition, the paltry benefits to be accomplished by this restriction suggest strongly that the "problem" Cincinnati is seeking to address is insufficiently "compelling" to justify a content-based distinction.

²⁹ The ordinance at issue also impermissibly discriminates against certain types of noncommercial speech. To illustrate, Section 911-17 of the Cincinnati Municipal Code authorizes the distribution of newspapers of general circulation only via newsracks. This unconstitutionally discriminates against, for example, noncommercial local newspapers with a limited circulation.

of *Revenue*, 460 U.S. 575, 581 (1983), it impermissibly "targets a small group of" publications. *Arkansas Writers*, 481 U.S. at 229.³⁰

As was the case with Arkansas's unconstitutional content-based tax on magazines, "[i]n order to determine whether a magazine is subject to [the ban]," Cincinnati's "enforcement authorities must necessarily examine the content of the message that is conveyed." *Arkansas Writers*, 481 U.S. at 230 (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984)). But "[s]uch official scrutiny of the content of publications as the basis for [a ban on access to newsracks] is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writers*, 481 U.S. at 230.

The harmful implications of empowering the government to make content-based determinations of the kind required by this ordinance are easily demonstrated. It is one thing to "impos[e] on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful" in the context of commercial claims. *Zauderer*, 471 U.S. at 646. As demonstrated above, there is, at the very least, a common-law tradition supporting the undertaking of this task by the state. It is quite another, however, to permit government officials to regulate speech in any manner they choose based on a determination that it is commercial.

Indeed, it is often difficult "in the first instance [to] decid[e] whether the proposed speech is commercial or

³⁰ In fact, "the basis on which [Cincinnati] differentiates between [publications] is particularly repugnant to the First Amendment" because whether a publication is subject to the ban "depends entirely on its content." *Id.* "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). See also *Carey v. Brown*, 447 U.S. 455, 462-63 (1980). "Regulations which permit the Government to discriminate on the basis of content cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

noncommercial. In individual cases, this distinction is anything but clear." *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). The Framers understood, and *Virginia Pharmacy* explicitly recognized, that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." 425 U.S. at 765. Or, as Benjamin Franklin put it, the "Opinions" in advertisements "ought . . . to have the advantage of being heard by the Publick," see *supra* page 18. It is impossible to predict the source of the next important idea; in today's consumer-oriented society it may well be contained in an advertisement. The Framers therefore extended the protection of the First Amendment to *all* of the "press." They recognized that what is material and economic is also political, and that commercial messages are often "indispensable to the formation of intelligent opinions as to how [our] system ought to be regulated or altered." *Virginia Pharmacy*, 425 U.S. at 765.

Moreover, even if a city official were able to categorize the speech in the various publications, he or she presumably would have to assess the overall character of the publication in order to decide if it were commercial. On what basis is a city official to judge the general nature of the publication? Would Discovery Network's circulars be constitutionally protected were they to contain two articles on "protected" topics? Three? Is there a requisite percentage of ads to editorial content? In this regard, it bears noting that today's newspapers generally strive for a ratio of roughly 70% advertising to 30% editorial content. See C. Fink, *Strategic Newspaper Management* 43 (1988). Other publications, such as magazines, often have an even higher ratio of ads to editorial page. See, e.g., Hall's Magazine Reports (December 1991) (reporting that "Bride" magazine consisted of 77.6% advertisements during 1991).

Bureaucratic determinations as to whether a publication is "commercial" are problematic, especially where the implications of such a classification are the denial of

access to a vital means of distribution such as newsracks. For example, there are today many "shoppers" publications throughout the country. These papers often reprint some of the material that appears in traditional newspapers and repackage it with a large number of advertisements. While such "shoppers" are then distributed for the primary purpose of circulating their advertisements and to "propose a commercial transaction," they nevertheless contain some speech that is *fully protected* under any standard. Are they commercial or are they protected?

Finally, there is little principled distinction between Discovery Network's publications and the pre-printed advertising inserts commonly added to newspapers on Sundays or Wednesdays. These inserts are easily separated from the rest of the newspaper. Were this Court to permit bans on commercial circulars merely because of their content, it is not inconceivable that a government authority could try to ban such inserts on the grounds that they promote litter, harm the environment, and increase the demand for newsracks. Such a bar, if sustained, would seriously undermine the viability of the print press in this country.

CONCLUSION

The "freedom of the press" presupposes a vital and vibrant press. The Framers were practical men who viewed their liberties in a practical context. Many had first-hand experience with publishing and with advertising, and knew of the importance of advertising to the viability of the press. They scarcely would have adopted a regime limiting government regulation of political speech but permitting discrimination against the very messages which made that speech possible.

Yet that is the principle at stake in this case: whether truthful commercial messages about lawful products and services may be treated entirely differently from non-commercial speech merely on the basis of their commercial content. If such discrimination is permitted, then governmental officials may in the future assert supposedly "sub-

stantial" interests concerning health, safety, and other matters in a way that threatens to cripple important segments of the press in this country. This threat of censorship is too great, and the "benefits" to be gained from such serious restrictions on the press are too attenuated, to justify adopting such a rule.

This Court therefore ought to strike down the Cincinnati ordinance, affirm the decision of the Sixth Circuit, and confirm that truthful, non-misleading commercial messages concerning lawful products and services are entitled to the full protection of the First Amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1200

THE CITY OF CINCINNATI,
Petitioner,

v.

DISCOVERY NETWORK, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL
FOUNDATION AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with commercial free speech issues, including *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281 (1990); *Pacific Gas and Electric Co. v. Public Utility Comm'n of California*, 475 U.S. 1 (1986); and

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980).

WLF recognizes that state and local governments have a strong interest in regulating usage of their streets and sidewalks, in order to protect the public health and safety and to promote a clean and aesthetically pleasing environment. WLF further recognizes that such regulation is not rendered illegitimate simply because it may inhibit citizens' efforts to express themselves.

WLF nonetheless is extremely concerned that state and local governments, in the exercise of their police powers, not pick and choose among the types of lawful expression they will encourage and those they will subject to strict regulation. All truthful, lawful speech -- regardless whether it can be classified as "commercial" or "noncommercial" -- is entitled to substantial First Amendment protection and should not be singled out for regulation simply because government officials deem its subject matter to be of lesser importance. WLF is concerned that Cincinnati is engaged in just such content-based discrimination against commercial speech in this case; Cincinnati is attempting to ban Respondents' newsracks from city sidewalks while leaving undisturbed other newsracks that cannot meaningfully be distinguished from Respondents'.

In the interests of judicial economy, WLF hereby adopts by reference the Statement of the Case set forth in Respondents' brief. WLF submits this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner categorizes Discovery's and Harmon's publications as commercial speech and goes on to argue as if therefore any regulation of these publications which

serves a governmental interest in a reasonable way must pass constitutional muster. This is wrong.

Ever since *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court has recognized that designating some speech as "commercial" and thence allowing untrammelled scope for its regulation would remove from the protection of the First Amendment a category of speech whose free flow, "[s]o long as we preserve a predominantly free enterprise economy, . . . is indispensable." *Virginia Citizens*, 425 U.S. at 765.

This Court has identified commercial speech as speech which "proposes a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473 (1989) (emphasis added) (citing *Virginia Citizens*, 425 U.S. at 762). Speech is not "commercial" merely because it is "uttered for a profit." *Fox*, 492 U.S. at 482. Nor does the degree of First Amendment protection turn on whether "money is spent to project it, as in a paid advertisement of one form or another," or whether speech "involve[s] a solicitation to purchase or otherwise pay or contribute money." *Virginia Citizens*, 425 U.S. at 761 (citations omitted). However, "communications 'can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . .'" *Fox*, 492 U.S. at 475 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983)). Such communications earn full constitutional protection only if the commercial and non-commercial speech are "inextricably intertwined." *Fox*, 492 U.S. at 474.

In elaborating the kind and degree of constitutional protection for commercial speech this Court has not devoted much attention to marking the boundaries of this concept beyond these broad guidelines. That is not surprising because analysis will not readily reveal where commercial speech leaves off and just plain speech takes over. Neither the subject matter of the speech, nor the motivation of the speaker, nor the fact that the speaker is

itself a commercial entity can supply a principle of differentiation.

The two publications involved in this case demonstrate how arbitrary the designation can be. Respondent Discovery Network's magazine provides information about its educational programs to Cincinnati residents. Without doubt, the texts and other materials used in these courses are entitled to full First Amendment protection. This being the case, information about these courses ought to receive the same level of protection. A course catalogue distributed by the University of Cincinnati would surely receive full First Amendment protection.

Respondent Harmon Publishing Company's *Home Magazine* lists homes and other real estate for sale or rent. The casual description of this publication as merely commercial is also problematic. Perhaps an individual classified ad or real estate listing does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). However, the collection of such listings performs quite a different function. It allows potential buyers to survey the real estate market and make comparisons between offerings. When information is presented in this form, it functions less like a classified ad and more like a consumer's guide to the real estate market. In any event, *Home Magazine* does have some noncommercial content. It occasionally includes information about market trends and other real estate matters. J.A. at 166-67. If *Home Magazine* is a commercial publication, it is only because it does not include enough of such material. But surely the degree of First Amendment protection afforded a publication should not vary as a function of its ratio of text to advertising.

This complaint about conventional commercial speech analysis does not prove too much. Of course advertising, contract forms, and many of the other items categorized as commercial speech attract reasonable forms of regulation peculiar to them. It is neither unreasonable nor surprising

that the Court has allowed government to forbid false advertising (as it does defamatory speech) while it may not control the propagation of false ideas or information in political campaigns. The functions, tendencies, and context of professional advertising, for instance, make it constitutionally susceptible to regulation for misleading content as well as downright falsity. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979). And where advertising constitutes direct solicitation of conduct that may be forbidden or bears a particular stigma, there we have speech "brigaded with action," *Speiser v. Randall*, 357 U.S. 513, 536-37 (1958) (Douglas, J. concurring), and as such also attracting a special allowance for regulation. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). None of these forms of regulation is in issue here and none of these justifications for it are relevant.

To be a valid restriction of commercial speech, government regulations must cure some evil generated by a particular kind of commercial speech. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interest served by its regulation." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) (emphasis added); see also *Virginia Citizens*, 425 U.S. at 761 ("If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content"). Cincinnati's regulation limiting the use of newsracks to newspapers of general circulation does not seek to restrict a particular kind of commercial speech. It restricts commercial speech *qua* commercial speech.

The publications in issue here deal, so far as the record shows, accurately and unobjectionably with lawful activity -- indeed in the case of Discovery Network the activity promoted is surely itself fully protected by the First Amendment. The regulation in question here does not address any of the recognized or imagined evils that

have been invoked to justify greater governmental impositions on advertising. Whatever harms come about from Respondents' newsracks are indistinguishable from those that would be caused by newsracks used to distribute *The Cincinnati Inquirer* (with which Respondent *Home Magazine* inevitably competes for advertising revenue), a diocesan newsletter, or *The Daily Worker*. The regulation in question here discriminates between publications, all of which create the same problems of safety and visual blight, solely on the basis of the contents of the publications. The degree of hazard or blight has nothing to do with the commercial natures of Respondents' publications. None of the Court's decisions, accepting them all as sound and valid, allow this kind of content-based discrimination. Newspapers require no special dispensation so as to justify laws discriminating against other media that compete with them. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 780 (1988) (White, J., dissenting) ("the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers").

Accordingly, the decision below may be affirmed without requiring the Court to inquire whether the discrimination is justified by a compelling, or merely a substantial, interest or whether the city has chosen the least restrictive means of addressing the problem of street safety and amenity. *See Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). As far as *amicus* is concerned, the city is free to ban all newsracks, or limit their number, density, design, or location. In so doing, however, it may not exempt one type of publication from regulation altogether, while placing the whole regulatory burden on Respondents, who have not at all been shown to contribute in some special way to the problem the city addresses.

ARGUMENT

I. RESPONDENTS' PUBLICATIONS DESERVE SUBSTANTIAL CONSTITUTIONAL PROTECTION UNDER SETTLED FIRST AMENDMENT PRINCIPLES

A. Commercial Speech May Not Be Subject To Discriminatory Regulation Merely Because It Is Commercial, But Only If It Uniquely Generates Harm

First Amendment protection of speech and press are both implicated in this case. Those protections apply to the widest variety of subjects: politics, social commentary, personal expression (artistic and not so artistic). Speakers and publishers are protected in their attempt to persuade, instruct, move, or annoy the audience they choose. And readers and listeners are protected in their access to information, instruction, persuasion, edification, and amusement. These are basic principles. No rational system of law can accept them while begrudging protection to speech and writing (such as that engaged in by Respondent Harmon Publishing Co.) about one of the most important decision American households make: the purchase of a home. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977); *cf. Virginia Citizens*, 425 U.S. at 761. It would be literally absurd to give full measure of First Amendment protection to dancers unadorned except for G-strings and pasties, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), and yet to stint on such protection for Respondent Discovery Network's publication informing persons of educational opportunities.

There may be controversy about the ability of the market optimally to order all manner of economic choice. It is a non-sequitur of major proportions to conclude that

therefore government may act to limit or control what audiences can hear and speakers and publishers may seek to tell them about their market choices. The lesson Justice Holmes sought to teach in his *Lochner* dissent, see *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), is learned too well if it is extended from allowing virtually free rein to government regulation of market behavior to allowing virtually free rein to regulation of those who speak and publish information relevant to market behavior.

The notion is untenable that a speaker's or publisher's motives, for instance a motive to make money, should bear on the measure of First Amendment protection enjoyed. Most publishers, most media in this country exist to make money. See *Simon & Schuster v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991). No one has ever supposed that the claims of high purpose habitually emitted by publishers of books and newspapers, producers of films, or manufacturers of records must be taken at face value, lest their First Amendment protection be compromised. It is true that some speakers and publishers make money from the sale of the communication itself: movies, books, and records tend to have this characteristic. Others are profitable if they succeed in persuading their audience to spend their money or exercise their franchise, see *Buckley v. Valeo*, 424 U.S. 1 (1976), in certain ways. There is no reason why the latter speech and publication should enjoy less protection than the former.

In any event, these two forms of expression often come inextricably intertwined. *Bolger*, 463 U.S. at 69. Airline and credit card companies distribute magazines replete with restaurant reviews and articles about the pleasures of far away resorts, all designed to encourage the reader to spend money in just those establishments. Skiing magazines evaluate and stimulate the appetite for ski equipment. The same is true of audio equipment, computer, firearm, gardening, and numerous other

specialized magazines.¹ In many of these, the difference between text and advertisement is impossible to maintain, and it is inconceivable that it would be constitutionally permissible to make the extent of regulation turn on an inquiry into who exactly paid the text writer and why. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The speech at issue in this case illustrates the difficulty that inheres in drawing a distinction between commercial and noncommercial speech. Respondent Discovery Network's magazine provides information about its educational programs to Cincinnati residents. Without doubt, the texts and other materials used in these courses are entitled to full First Amendment protection. This being the case, information about these courses ought to receive the same level of protection. A course catalogue distributed by the University of Cincinnati would surely receive full First Amendment protection. Cf. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that statute forbidding solicitation for religious or philanthropic causes violates freedom of speech and religion). Why then should Respondent's publication, which is analytically indistinguishable from such a catalogue, be demoted to a lesser category of communication?

Respondent Harmon Publishing Company's *Home Magazine* lists homes and other real estate for sale or rent. The casual description of this publication as commercial is also problematic. Perhaps an individual classified ad or real estate listing does no more than propose a commercial transaction. However, the collection of such listings performs quite a different function. It allows potential buyers to survey the real estate market and make comparisons between offerings. When information is

¹ The *New York Times* recently reported that a dental research institute in Princeton, New Jersey had published its conclusion that chocolate is good for your teeth. The institute is funded by a candy company. Barry Meier, *Dubious Theory: Chocolate a Cavity Fighter*, N.Y. Times, Apr. 15, 1992.

presented in this form, it functions less like a classified ad and more like a consumer's guide to the real estate market. In any event, *Home Magazine* does have some noncommercial context. It occasionally includes information about market trends and other real estate matters. J.A. at 166-67. If *Home Magazine* is a commercial publication, it is only because it does not include enough of such material. But surely the degree of First Amendment protection afforded a publication should not vary as a function of its ratio of text to advertising. Otherwise, newspapers would receive less protection on Sundays and during the Christmas season.

Given the difficulties in drawing lines, it may be wise, as some scholars have suggested, to discard the distinctions between commercial and non-commercial speech.² At the very least, this Court should underscore its traditional limitation on commercial speech restrictions. The regulation must be justified by the *nature* of the particular commercial expression and the harms that ensue to significant governmental interests. *Central Hudson*, 447 U.S. at 563. The nature of a particular expression may encompass both its content, such as false advertising, and its form, such as coercive in-house solicitations. However, the government may not impose discriminatory restrictions based on a tenuous measure of commercial versus non-commercial character.

² Judge Kozinski and Stuart Banner observe that the commercial speech doctrine is not supported by constitutional analysis, and has not provided suitable distinctions in various instances between commercial, artistic, political, scientific, and religious speech. They suggest adoption of standard content-neutral analysis for all speech: "Governmental regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on free expression is no greater than necessary." Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 651 (1990) (footnote omitted).

B. Appropriate Recognition of Respondents' First Amendment Rights Will Not Foreclose Necessary Government Regulation

Robust protection of commercial speech need not entail a "return[] to the bygone era of *Lochner*." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting). It is a canard to claim that full protection of commercial speech precludes the appropriate regulation of commerce. This point is well-illustrated by *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977), which held that a city may not prohibit homeowners from posting "For Sale" signs to stem white flight from a recently integrated community. *Linmark* does not cast doubt upon government's power to regulate the real estate market or to combat racial discrimination; the Court merely declared that the government may not pursue its goals by suppressing the free flow of commercial information.

It is unnecessary virtually to deprive the entire inexact category of commercial speech of First Amendment status in order to sustain government regulation of that subset of commercial speech which is harmful to a well-functioning economy. Nearly every kind of protected speech has its unprotected ugly cousin. Pornography is protected, but obscenity is not. Personal criticism is protected, but defamation is not. Invectives are protected, but fighting words are not. Passionate advocacy is protected, but incitement is not. Likewise, the government may regulate false speech, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"), or speech proposing illegal activity, see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (upholding ban on publication of want ads for gender segregated jobs), whether or not it is commercial. Speech that is a step along the way to a criminal act, like the communication of the floor plan of a bank between persons planning a robbery or a threat communicated to an

extortion victim, is not protected. And speech or publication that appropriates another's name or likeness or invention has likewise always been unprotected, even if the appropriating expression may claim justification by motives the most elevated. See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

It is not necessary to determine here whether the regulation is permitted because the level of constitutional protection is less or because instead the intensity of the governmental interest is more. Suffice it to say that the regulation must at least be appropriate to the relation between the two. And so the prohibition against false or misleading advertising is wholly appropriate to this kind of speech. Similarly, a text that does no more than propose a particular bargain is no more immune to regulation than the contractual arrangement it is a step along the way to concluding. See, e.g., *Pittsburgh Press*, 413 U.S. at 388 (upholding ban on publication of want ads for gender segregated jobs). But certainly the publications discriminated against by the city's policy here -- like so much advertising -- exceed the bounds of these justifications for regulation. The ways in which they do so are significant.

Respondent Discovery Network's publication contains far more than contract forms to be clipped out and mailed to conclude a bargain. It describes and extols the virtues of a variety of lectures and courses available at Respondent's school. It presumably also gives schedules, tuition, and terms. Nothing could be clearer than that the contents of these courses attract the full measure of First Amendment protection -- though here again the conduct of such schools is subject to a wide variety of regulation. Similarly there can be no doubt that the texts, outlines, and other materials given out or sold in connection with these courses enjoy full First Amendment protection. And so too would course catalogues, such as are distributed by every college and university. Why then should this publication, which analytically -- though not in tone and

cachet -- is indistinguishable from such a catalogue be demoted to some lesser category of communication, such that the city is allowed to discriminate against it in favor of the most debased scandal sheet distributed free and supported by advertising for pornographic literature?

Harmon Publishing Company's *Home Magazine* offers a different rationale for disallowing the discrimination practiced by the city. A classified ad or real estate listing comes very close to being the kind of text that does no more than propose a bargain. That is why such ads and listings may be regulated to comply with fair housing and equal employment opportunity policies. *Pittsburgh Press*, at 385. But an editorial seeking to justify residential segregation would be beyond the reach of such regulation. It is a mistake to argue from the premise underlying *Pittsburgh Press* to the conclusion that *Home Magazine* enjoys no greater First Amendment protection than the individual bare-bones listings it collects. While each listing may do no more than propose a bargain, the collection performs quite a different function. It allows potential buyers to survey the scene, make comparisons, and arrive at conclusions about the state of the market. A magazine carrying articles purporting to do just that might impart some of the same information and give addresses and phone numbers of sellers, and the publishers of such articles may even require payment in exchange for each mention. Magazines offering film or restaurant reviews may operate on this same venal principle. Yet this venality would hardly remove the publication from the scope of the speech and press protection of the Constitution. The listing without comment is, if anything, more reliable, comprehensive, and objective. In any event *Home Magazine* does in fact include some such articles in addition to the listings. Surely the degree of First Amendment protection should not vary as a function of the ratio of text to advertising.

II. PETITIONER'S REGULATION MUST FAIL AS AN ARBITRARY AND IMPERMISSIBLE CONTENT-BASED DISCRIMINATION

The city does not claim that the contents of Respondents' publications threaten any of the harms that this Court has identified to justify regulation of commercial speech. The city says it is not concerned with their content, but only with preserving the amenity and safety of its streets. Such an argument would have considerable force if the city banned all newsracks, restricted them to certain areas, or limited their numbers on a first-come-first-served or random basis. But that is not what it has done. It has said that *The Cincinnati Inquirer* and other such papers may place newsracks in the street as they wish, while *Home Magazine* -- which of course is a competitor for an important class of advertising business -- may not use the street at all. Since this is a distinction based on content it cannot be justified as a time, place, or manner restriction, for those must be content-neutral. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). The Court has asserted that such regulation must be content-neutral to prevent government agents from making judgments about which kinds of speech are worthier than others. The risks of favoritism and improper motivation are palpable in this case. The kinds of publications the city council allows are exactly those which are in a position to reward or punish the politicians who make the regulation. And, as we have pointed out, the disfavored class is in direct competition with the newspapers the city would prefer.

The discrimination here is clearly based on the content of a publication. It certainly is not based on the differential secondary effects of the permitted and forbidden publications. *Cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding restrictions on locations of adult theaters where municipality had acted in response to secondary effects of such theaters on

surrounding community). Whether the analysis is undertaken in equal protection³ or First Amendment terms directly, the reasoning and conclusion are the same. The presence of a First Amendment claim means that discrimination must meet some kind of heightened scrutiny. But as we have discussed, what the city calls the commercial character of the publication involved here hardly provides even a rational basis for such a discrimination. *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (applying rational basis standard to invalidate discriminatory ordinance). And we suppose that considerably more than that is necessary by way of justification.

Cincinnati is incorrect in asserting that a time, place, or manner restriction qualifies as content-neutral so long as it is not intended to restrict the expression of a particular viewpoint. *See* Pet. Br. at 30. The Court recently rejected that contention, stating: "This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of a public discussion of an entire topic." *Burson v. Freeman*, ___ U.S. ___ (1992) (slip op. at 5) (plurality opinion); *id.* at ___ (slip op. at 8-9) (Stevens, J., dissenting). Even if one concedes that Cincinnati's prohibition of Respondents' newsracks does not suppress viewpoints expressed by Respondents while permitting expression of opposing viewpoints, it is undeniable that the prohibition has the effect of suppressing all discussion (via newsracks) of some topics while permitting newsracks that address other topics.

The Court's hostility to content-based speech regulation has on several occasions been directed at regulation of speech deemed commercial by the Court.

³ *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980) (invoking Equal Protection Clause to strike down Illinois statute that prohibited most residential picketing, but exempted certain types of labor picketing from the prohibition).

Thus, in *Linmark Associates*, the Court struck down an ordinance prohibiting placement of "For Sale" or "Sold" signs on lawns as an improper content-based regulation of commercial speech. The Court noted that the ordinance in question permitted posting of virtually any lawn signs other than signs stating that one's house was for sale; while suggesting that municipalities were free to prohibit all lawn signs, the Court held that the First Amendment forbids prohibiting some signs based on their content while permitting others. *Linmark Associates*, 431 U.S. at 94.

Similarly, *Bolger* struck down on First Amendment grounds a federal statute that prohibited the unsolicited mailing of commercial information regarding contraceptives. *Bolger*, 463 U.S. at 70. While accepting the notion that some content-based regulation of commercial speech may be permissible "[i]n light of the greater potential for deception or confusion in the context of certain advertising messages" (*id.* at 65), the Court said that the federal government's content-based discrimination against the mailings at issue could not stand in the absence of any evidence that the mailings could result in deception or confusion or were otherwise subject to regulation.

Nor, of course, is this a case where the government is regulating speech in an essentially proprietary capacity, a setting in which government may have more leeway to discriminate. See *Greer v. Spock*, 424 U.S. 828 (1976) (military post); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (advertising space on city transit vehicles). Even in that setting, however, the discrimination "must not be arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303; see also *Greer*, 424 U.S. at 838-39. In those cases -- where, as it happens, the regulators gave commercial speech preferential treatment over political speech -- the Court found that valid purposes existed to justify the discrimination.

Petitioner and its supporting *amici* argue that the newsrack ordinance's unequal treatment of general-

circulation newspapers and Respondents' publications does not constitute impermissible content-based discrimination because the Court has traditionally permitted speech categorized as "commercial" to be treated less favorably than speech categorized as "noncommercial." By thus pigeonholing Respondents' newsracks into a category labeled "commercial," Petitioner attempts to justify its ban on such newsracks while permitting other newsracks to remain on the city's streets.

But just as we have shown that no sufficient basis exists for discriminating between Respondents' publications and those the city would allow in terms of the harm sought to be addressed, so *a fortiori* no meaningful distinction can be drawn between the message conveyed by Respondents' newsracks as such and the message conveyed by newsracks containing general-circulation newspapers. Both types of newsracks attempt to draw attention to and to promote the distribution of publications contained in the newsracks. Given the lack of meaningful distinctions between the contents of the two types of publications, Petitioners cannot justify their prohibition of one type of newsrack and their acceptance of the other type of newsrack by attaching "commercial" and "noncommercial" labels to the publications.

The Court on occasion has expressed willingness to permit jurisdictions to discriminate against "commercial" speech based on the content of the speech. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a majority of the Court appeared willing to uphold an ordinance that permitted a property owner to post billboards on his own property that advertised the nature of the business being conducted on the property, but not to post billboards that advertised businesses being conducted elsewhere. *Metromedia*, 453 U.S. at 511-12 (plurality opinion); *id.* at 555-560 (Burger, J., dissenting). But in each such instance, the jurisdictions had substantial justifications for distinguishing among the expressive activities at issue. Thus, in *Metromedia*, the plurality opinion determined that the distinction San Diego drew

between on-site and off-site commercial billboards was constitutionally defensible because: (1) the ban on off-site billboards was directly related to the city's stated objectives of traffic safety and aesthetics; (2) off-site advertising with its periodically changing content presented a more acute problem than did on-site advertising; and (3) a commercial enterprise has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. *Id.* at 511-12.

In contrast, Petitioner has advanced no justification for favoring newspaper newsracks over Respondents' newsracks -- other than a naked preference for general-circulation newspapers based on the content of those publications. Petitioner has not argued that Respondents' newsracks present any more danger to traffic safety or to aesthetic sensibilities than do newspaper newsracks.⁴ Indeed, given that Respondents' newsracks make up such a small percentage of existing newsracks on the streets of Cincinnati, Petitioner's selective newsrack ban cannot have any appreciable effect on the traffic safety and aesthetic concerns Petitioner raises. Petitioner's decision to favor one type of publication based on the content of those publications is precisely the type of content-based discrimination that is not permitted under the First Amendment -- particularly when, as here, the First Amendment interests of Respondents are nearly identical to the First Amendment interests of those who seek to sell

⁴ *Amicus* City of New York suggests that newsracks such as those maintained by Respondents are a source of urban blight because they are often not well-maintained and because (since they can be opened without use of a coin) they can be used as trash dispensers. Suffice it to say that there is no such evidence in this record. Moreover, Petitioner's ordinance does not distinguish between newsracks based on whether they are coin-operated. Any such ordinance would, of course, prohibit newsrack distribution of the many general-circulation newspapers that are distributed for free.

general-circulation newspapers by placing them in newsracks.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE CITY OF CINCINNATI,
v. *Petitioner,*

DISCOVERY NETWORK, INC., *et al.,*
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF
THE U.S. CONFERENCE OF MAYORS, NATIONAL
INSTITUTE OF MUNICIPAL LAW OFFICERS,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, AND NATIONAL LEAGUE OF CITIES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the First Amendment creates a right to distribute commercial handbills through racks and boxes placed on public property.

2. Whether the City of Cincinnati must allow the distribution of commercial handbills through racks or boxes placed on public property because it permits newspapers to be distributed through sidewalk vending machines.

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1991

No. 91-1200

THE CITY OF CINCINNATI,
 v. *Petitioner,*

DISCOVERY NETWORK, INC., *et al.*,
 Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Sixth Circuit

BRIEF OF
 THE U.S. CONFERENCE OF MAYORS, NATIONAL
 INSTITUTE OF MUNICIPAL LAW OFFICERS,
 COUNCIL OF STATE GOVERNMENTS,
 NATIONAL GOVERNORS' ASSOCIATION,
 NATIONAL ASSOCIATION OF COUNTIES,
 INTERNATIONAL CITY/COUNTY MANAGEMENT
 ASSOCIATION, AND NATIONAL LEAGUE OF CITIES
 AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments. This case, yet another example of the ingenuity of counsel in fashioning constitutional challenges to a city's ordinary exercise of its police power, raises issues whose resolution will have a direct and substantial impact on *amici* and their members.

The court of appeals struck down a Cincinnati ordinance prohibiting the distribution of commercial handbills from dispensing boxes and racks placed on public property. In its decision, the court departed significantly from this Court's well-established approach for deciding First Amendment challenges to regulations of commercial speech. Specifically, the court:

- 1) failed to recognize that a state or local government has power to preserve public property for the uses to which it is lawfully dedicated and that the First Amendment does not require state or local government to cede possession of public property so that businesses may advertise as they choose;
- 2) reached the unprecedented conclusion that commercial speech is entitled to the same measure of First Amendment protection as any other speech, unless the regulation at issue is related to regulating either the commerce that the advertisement is promoting or the "distinctive effects" of that commerce; and
- 3) second-guessed the legislative determination underlying Cincinnati's regulation and expressly stated that no deference was due a city's decision in "close cases."

These errors threaten to upset time-honored standards by which state and local governments regulate commercial speech on public property. The court's decision imposes significantly higher burdens on state and local governments seeking to regulate commercial speech. It suggests that only uniform regulation of commercial speech and other speech can satisfy the First Amendment. It subjects governmental decisions

to judicial second-guessing if a court believes it can achieve a closer fit between a substantial governmental interest and the means chosen to promote that interest.

Unless corrected by this Court, the erroneous analysis of the court of appeals may result in numerous challenges to heretofore unquestioned regulations. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.¹

STATEMENT

A. Cincinnati's Commercial Handbill Ordinance

Cincinnati prohibits the distribution of "commercial handbills" on "any sidewalk, street or other public place within the city." Cincinnati Municipal Code § 714-23. Pet. App. 3a, 20a. A "commercial handbill" is defined to include "any printed or written matter . . . which advertises for sale any merchandise, product, commodity or thing" Cincinnati Municipal Code § 701-1-C (reproduced in Pet. App. 3a n.2, 20a). Another Cincinnati ordinance, however, expressly authorizes the distribution of "newspapers of general circulation in the city" from public racks or other structures on city sidewalks, "in accordance with rules and regulations promulgated by the city manager relating to the safety and unobstructed use of the streets by vehicular and pedestrian traffic." Cincinnati Municipal Code § 911-17. Pet. App. 20a.

B. Respondents' Distribution Of Commercial Handbills From Dispensing Devices on City Sidewalks

Respondents Discovery Network, Inc. and Harmon Publishing Co. are for-profit corporations that ad-

¹The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

vertise their services through commercial magazines that they publish and distribute free of charge. Discovery's magazine, which is published nine times per year, advertises "non-credit educational, recreational and social programs" that the corporation offers for a fee to persons in the greater Cincinnati area. Harmon's magazine, entitled "Home Magazine," advertises real estate in various locations throughout the United States, including residential properties in the greater Cincinnati area. Pet. App. 2a, 19a.

Beginning in 1989, Discovery and Harmon distributed some of their commercial magazines through metal or plastic dispensing devices placed on the public sidewalk at various locations within the city of Cincinnati. Together, Discovery and Harmon placed some sixty-two such devices on the sidewalks of the city. The devices were by no means the principal method through which Discovery and Harmon distributed their advertisements. Only fifteen percent of Harmon's magazines and approximately one-third of Discovery's magazines were distributed through the dispensing boxes. Pet. App. 13a.

In February 1990, the Cincinnati city council passed a motion requiring the Department of Public Works to enforce the existing ordinance prohibiting the distribution of commercial handbills on public property. Pet. App. 3a. During the following month, the City notified Discovery and Harmon that their magazines were "commercial handbills" within the meaning of the ordinance and that their dispensing devices therefore should be removed from the public sidewalks. *Id.* at 21a. Respondents were afforded administrative hearings on the City's order, and the order to

remove the dispensing devices was upheld. *Id.* at 21a-22a.

C. Respondents' Challenge To The Cincinnati Ordinance

In June 1990, respondents filed this action in the United States District Court for the Southern District of Ohio. Proceeding under 42 U.S.C. § 1983, they alleged that Cincinnati's prohibition against the distribution of commercial handbills on public property violated the First Amendment. They complained, among other things, that Cincinnati could not lawfully permit newspaper vending machines and at the same time ban similar dispensing devices for commercial handbills. Cincinnati agreed to allow respondents' dispensing devices to remain on the public sidewalks while the litigation was pending. Pet. App. 22a.

D. The District Court's Decision

Following an evidentiary hearing, the district court ruled that respondents' magazines constitute commercial speech. Pet. App. 22a. The court also ruled that "[n]either publication contains noncommercial speech that is inextricably intertwined with the commercial speech." *Id.* at 22a-23a.

The court acknowledged that the City "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way." Pet. App. 23a. Nevertheless, the court decided that Cincinnati's ordinance "is an excessive means by which to accomplish the governmental objectives of safety and aesthetic appeal." *Id.* at 23a-24a. Declaring that there is no "reasonable fit" between the City's ends and the means chosen to accomplish those ends, the court held the ordinance invalid under the First Amendment.

E. The Court Of Appeals' Decision

The court of appeals affirmed. The court based its decision on two highly dubious propositions. First, the court announced that "‘commercial speech’ only receives lesser first amendment protection when the governmental interest asserted is either related to regulating the commerce the ‘commercial speech’ is promoting, or related to any distinctive effects such commercial activity would produce" Pet. App. 2a. Starting from this premise, the court concluded that respondents' advertising had a "high value," *id.* at 13a, and that Cincinnati's ordinance does not "prescribe a 'reasonable fit' between the ends asserted and the means chosen to advance them." *Id.* at 7a, 13a-14a. Second, the court held that the ordinance cannot be justified as a proper "time, place, or manner" restriction on respondents' speech. Because the ordinance distinguishes between commercial speech and noncommercial speech, the court said, it is not "content-neutral," and it therefore cannot be justified as a reasonable time, place, or manner regulation.

SUMMARY OF ARGUMENT

I.

State and local governments are not obliged to dedicate public property to be used for newspaper dispensing racks or commercial handbill boxes. The First Amendment is not abridged by regulations prohibiting the placement of vending machines on public sidewalks, whether the publications involved constitute commercial speech or some other, more highly protected kind of expression.

It is well-settled that a state or local government, "no less than a private owner of property, has power

to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). It is likewise beyond dispute that the First Amendment does not guarantee the right to communicate one's views at all times and places or in every manner that one desires. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988); *id.* at 773 (White, J., dissenting); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderley*, 385 U.S. at 47-48. As necessary corollaries, the First Amendment "does not mean that one can . . . distribute where, when and how one chooses," *Breard v. Alexandria*, 341 U.S. 622, 642 (1951), and "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981); *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (plurality opinion).

This Court's decisions thus support the view that state and local governments are free, consistent with the First Amendment, to prohibit the placement of dispensing boxes and racks on public property. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508, 512 (plurality opinion); *id.* at 553 (Stevens, J., dissenting in part); 568 (Burger, C.J., dissenting); 570 (Rehnquist, J., dissenting); *City of Lakewood supra*. This Court has long recognized that state and local governments may legitimately exercise their police powers to prohibit certain methods of communication on public or private property. For example, the Court has found that preserving public property for its intended use, improving the aesthetic environment, and enhancing pedestrian and motorist safety are all substantial governmental interests,

which can justify regulations prohibiting the use of sound trucks, political advertising on public buses, certain outdoor billboards, and signs posted on government property to convey messages. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303 (1974); *Metromedia, Inc. v. San Diego*, *supra*; *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

The opinions in *City of Lakewood* strongly imply that a total ban on sidewalk devices dispensing commercial speech does not violate the First Amendment. Three Justices in that case, in the context of a dispute involving newspaper vending machines, expressly stated that "our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional" 486 U.S. at 773 (White, J., joined by Stevens and O'Connor, JJ., dissenting). Justice Brennan, and the three Justices who joined his opinion for the Court, said nothing to the contrary. Rather, they ruled that the lower court's approval of an "absolute ban on residential newsrack placement" was not formally before the Court, and they expressly reserved the issue of whether a city "may constitutionally prohibit the placement of newsracks on public property." *Id.* at 755 n.4, 762 n.7.

If Cincinnati can constitutionally ban from public property boxes and racks distributing all kinds of speech, the only question remaining is whether Cincinnati can take the more limited step of banning such devices for "commercial handbills." To put the matter another way, the question is whether Cincinnati, by permitting newspapers to be distributed through sidewalk vending machines, has somehow dis-

abled itself from banning the distribution of commercial advertisements on public property. In our view, for the reasons to which we now turn, the City has imposed no such disability on itself.

II.

This Court has frequently recognized a distinction between commercial and noncommercial speech in evaluating challenges to state or local regulations. It has also repeatedly held that the degree of First Amendment protection afforded speech depends upon whether the speech is commercial or noncommercial. Commercial speech is entitled to a lesser degree of First Amendment protection than noncommercial speech. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

Under this Court's precedents, a state or local government can regulate commercial and noncommercial speech differently without abridging First Amendment protections. The court of appeals reached the contrary conclusion only by misreading this Court's commercial speech decisions.

First, the court of appeals misapprehended one of the fundamental principles established in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). The court admitted that Cincinnati's "commercial handbill" regulation would be constitutional if a majority of the Court in *Metromedia* had upheld San Diego's regulation of billboards as a permissible regulation of commercial speech. But a majority of the Justices in

Metromedia did just that. Seven Justices found no First Amendment infirmity in a regulation that banned all commercial speech on billboards. *Id.* at 508, 512 (plurality opinion); 553 (Stevens, J., dissenting in part); 568 (Burger, C.J., dissenting); and 570 (Rehnquist, J., dissenting). For this reason alone, the court of appeals' decision should not stand.

Second, despite this Court's clear statements on the issue, the court of appeals, without citation to any authority, determined that commercial and noncommercial speech are entitled to the same First Amendment protection in this case because:

the lesser value placed on commercial speech only justifies regulations dealing with the content of the speech itself, or with distinctive effects that the content of the speech will produce.

Pet. App. 10a. In other words, the court held that a regulation directed at the content of commercial speech receives less First Amendment protection than a regulation directed only at the manner in which commercial speech is distributed.

Third, the court of appeals ruled that a regulation limited to commercial speech cannot be "content-neutral." The court's discussion is incompatible with the way in which this Court has used the concept of content neutrality. This Court has never held or even suggested that distinguishing between commercial speech and noncommercial speech is not "content-neutral." Indeed, the Court has repeatedly recognized that very distinction and created separate approaches for dealing with commercial speech and noncommercial speech. In the context of commercial speech, a regulation is content-neutral if, like the Cincinnati ordinance at issue here, it applies in the same manner

regardless of the substantive content of the commercial message.

Fourth, notwithstanding this Court's statements that it has "been loath to second-guess the Government's judgment" and that it "leave[s] it to governmental decisionmakers to judge what manner of regulation may best be employed," *Fox*, 492 U.S. at 478, 480, the court of appeals bluntly asserted: "[w]e do not believe that these statements command us to give the city the benefit of the doubt in close cases." Pet. App. 9a-10a n.8. Having decided that no deference is due the City's ordinance, the court of appeals improperly rebalanced the interests involved to achieve a closer fit between the substantial government interest and the means chosen to advance that interest. This was error. Where, as here, there is no dispute that the governmental interests underlying the regulation are legitimate and substantial, this Court does not adjust the "fit" based upon its reevaluation of the ends and means involved. *Fox*, 492 U.S. at 480.

ARGUMENT

I. THIS COURT'S DECISIONS RECOGNIZE THE POWER OF LOCAL GOVERNMENTS TO REGULATE OR EVEN PROHIBIT THE PLACEMENT OF NEWSPAPER VENDING MACHINES ON PUBLIC PROPERTY

A. State And Local Governments Have Well-Established Power To Preserve Public Property For Its Lawfully Dedicated Use And To Regulate The Use Of Such Property To Advance Substantial Safety And Aesthetic Interests

It is well-settled that a state or local government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Here, respondents assert a right to set aside the property rights of the City of Cincinnati and to permanently occupy a portion of the city sidewalks to distribute their commercial publications through metal or plastic dispensing devices. Respondents rely exclusively on the First Amendment.

The decisions of this Court establish that state and local governments may legitimately exercise their police powers to preserve or improve their aesthetic environments and to provide for the safety of their residents. For example, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court held that the power of state and local governments to take actions to preserve or improve their aesthetic environments may often override certain interests that implicate the First Amendment.

In *Koracs v. Cooper*, 336 U.S. 77 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure

to certain methods of expression which may legitimately be deemed a public nuisance. In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held that the State had a substantial interest in protecting its citizens from unwelcome noise. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld the City's prohibition of political advertising on its buses, stating that the City was entitled to protect unwilling viewers against intrusive advertising that may interfere with the City's goal of making its buses "rapid, convenient, pleasant, and inexpensive," *id.*, at 302-303 (plurality opinion). See also *id.*, at 307 (Douglas, J., concurring in judgment); *Erznoznik v. City of Jacksonville*, 422 U.S. [205,] 209, and n.5 [(1975)]. These cases indicate that the municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

Taxpayers for Vincent, 466 U.S. at 805-806 (emphasis added) (footnote omitted).

Similarly, this Court has recognized that safety interests may often override certain interests that implicate the First Amendment. In *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 493 (1981) (plurality opinion), this Court considered a billboard ordinance designed "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." A majority of the Court concluded that a city's safety and aesthetic interests are sufficiently substantial to justify a content-neutral prohibition against the use of billboards. See *id.* at 507-508 (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). Five

Justices expressly found the interest in safety adequate to support such a ban, and seven Justices found "the City's interest in avoiding visual clutter" a sufficient justification. See *Metromedia*, 453 U.S. at 507-508 (plurality opinion); *id.* at 560-561 (Burger, C.J., dissenting); *Taxpayers for Vincent*, 466 U.S. at 806-807 (citations omitted).

In this case, it is undisputed that Cincinnati regulates the use of dispensing devices on public property in order to advance substantial aesthetic and safety interests. Although the City chose *not* to ban all newspaper vending machines from public sidewalks, its legitimate interests were more than adequate to justify such a total ban.

B. The First Amendment Does Not Create A Right To Distribute Commercial Handbills Through Boxes Or Racks Placed On Public Property

The First Amendment "does not mean that one can talk or distribute where, when and how one chooses." *Breard v. Alexandria*, 341 U.S. 622, 642 (1951). Important rights other than those of the First Amendment are involved in this case, and only by adjusting those rights can the community enjoy "both full liberty of expression and an orderly life." *Id.*

Moreover, as this Court has recognized, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). See also *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (plurality opinion) ("the government's ownership of property does not automatically open that property to the public"). Similarly, there is no

right to assistance from state and local governments in distributing commercial or noncommercial speech. See *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983) (rejecting "notion that First Amendment rights are not somehow fully realized unless they are subsidized by the State").

When these well-established principles are applied to respondents' challenge to the Cincinnati commercial handbill regulation, it is clear that respondents have no First Amendment right to distribute their advertisements through boxes or racks placed on public property. To recognize such a right would force state and local governments to assist in the communication of commercial speech by making public property available as distribution centers. This the First Amendment does not require. See *Pell v. Procunier*, 417 U.S. 817, 833-834 (1974).

This Court's decisions in *Metromedia* and *City of Lakewood* confirm that state and local governments do not run afoul of the First Amendment if they act to limit or even prohibit dispensing boxes and racks on public property. In *Metromedia*, the plurality stated that a city regulation allowing on-site billboard advertising, but banning off-site billboard advertising (subject to certain narrow exceptions), was constitutional "insofar as it regulates commercial speech" 453 U.S. at 512 (White, J., joined by Stewart, Marshall, and Powell, JJ.). The plurality suggested that a total prohibition of billboard commercial speech, whether on-site or off-site, also would be constitutionally permissible.

If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city

has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends

Id. at 508.

Other members of the Court also expressed the view that a total ban on a particular manner of communicating commercial speech would be constitutional. Justice Stevens stated that "a wholly impartial total ban on billboards would be permissible." *Id.* at 553 (Stevens, J., dissenting in part). Justice Rehnquist said that "the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community." *Id.* at 570 (Rehnquist, J., dissenting). Chief Justice Burger likewise left little doubt that in his view a city could ban billboards altogether. *Id.* at 567-68.

Taken together, the various opinions in *Metromedia* show that a total ban on billboards, including both commercial and noncommercial billboards, would be consistent with the First Amendment. The kind of total ban discussed in the *Metromedia* opinion would have applied, of course, to billboards on both public and private property. In this respect, the regulation would have been more far-reaching than the Cincinnati ordinance at issue here, which applies only to the public sidewalks. As we explain in greater detail below, the *Metromedia* opinions also would support a more limited ban, applying only to billboards with commercial speech.

City of Lakewood is to the same effect. The local ordinance at issue there originally banned the private placement of any structure on public property. The ordinance was subsequently amended to permit the mayor broad discretion in deciding whether and where to allow newspaper vending machines on such property. Although the Court held the amended or-

dinance invalid because of the amount of discretion it gave to the mayor, no Justice suggested that a total ban on newspaper vending machines and newsracks would violate the First Amendment.

The four Justices joining the Court's opinion noted that the lower court's approval of an "absolute ban on residential newsrack placement" was not before the Court, and they did not "pass on" whether a city "may constitutionally prohibit the placement of newsracks on public property." *City of Lakewood*, 486 U.S. at 755 n.4, 762 n.7. The three dissenting Justices expressly stated that "our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternative means of 24-hour distribution of newspapers exist." *Id.* at 773.

Thus, *Metromedia* and *City of Lakewood* support the conclusion that state and local governments are free to prohibit dispensing boxes and racks on public property without violating the First Amendment. The only remaining question is whether the First Amendment nevertheless precludes a city from taking the lesser step of banning such boxes for commercial handbills.

II. COMMERCIAL AND NONCOMMERCIAL SPEECH DO NOT HAVE EQUAL FIRST AMENDMENT VALUE AND ARE NOT ENTITLED TO EQUAL FIRST AMENDMENT PROTECTION

A. This Court Has Repeatedly Stated That Commercial Speech Enjoys Less First Amendment Protection Than Noncommercial Speech

This Court has repeatedly recognized a distinction, for First Amendment purposes, between commercial and noncommercial speech. *Fox*, 492 U.S. at 473-474; *Posadas de Puerto Rico v. Tourism Company of*

Puerto Rico, 478 U.S. 328, 340 (1986); *Bolger*, 463 U.S. at 64-65. Commercial speech is entitled to a lesser degree of First Amendment protection than noncommercial speech. As the Court said in *Fox*:

Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."

Fox, 492 U.S. at 477 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)) (brackets in original). Similarly, this Court in *Zauderer* emphasized that, while "commercial speech" is entitled to First Amendment protection, the protection is "somewhat less extensive than that afforded 'noncommercial speech.'" 471 U.S. at 637 (citations omitted).

The Court has identified several reasons for its consistent distinction between commercial and noncommercial speech. First, commercial speech generally makes a different contribution to the exposition of ideas. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). It is not at the core of what the First Amendment seeks to protect. Second, commercial speech tends to be more durable and robust than other kinds of speech. Because the commercial speaker has an economic self-interest in dissemination, there is little likelihood of the speech being chilled by regulation. *Id.* at 564 n. 6; *Bates v. State Bar*, 433 U.S. 350, 381 (1977). Third, commercial speakers normally have extensive knowledge of their products, services, and markets. They are particularly well situated to ensure the accuracy of

their speech and to comply with reasonable regulation. See, e.g., *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976). Finally, there is an inherent danger that affording equal First Amendment protection to commercial and noncommercial speech would erode the First Amendment protection of noncommercial speech. As this Court wrote in *Ohralik*,

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

436 U.S. at 456.

The court of appeals' approach to Cincinnati's "commercial handbill" ordinance departs significantly from this Court's decisions. Rather than accepting the well-established distinction between commercial and noncommercial speech, the court created two categories of commercial speech under the First Amendment, where only one category had existed before. The first category is commercial speech regulated because of the commerce it is promoting or the "distinctive effects" that that commerce could be expected to produce. Pet. App. 2a, 10a. Such commercial speech, in the court of appeals' view, has a "lesser value" and is entitled to less extensive First Amendment protection—even though, by hypothesis, the regulation concerns the content of the speech. The second category involves commercial speech regulated for different reasons, e.g., because of the manner in which the speech is distributed. The court of appeals would afford commercial speech in this category protection coextensive with that given to noncommercial speech,

notwithstanding the conflict between that approach and this Court's decisions. Pet. App. 13a.

The court of appeals' analysis is squarely undercut by the views expressed in *Metromedia*. As noted above, a clear majority of the Justices in *Metromedia* concluded that a ban on a manner of transmitting commercial speech (in that case, via billboards) was constitutional when supported by substantial governmental interests such as aesthetics and safety.

The court of appeals' approach turns this Court's First Amendment principles upside down. Under the Sixth Circuit's analysis, a regulation directed at the *content* of commercial speech is more likely to be sustained than a content-neutral regulation directed at the *manner* in which the commercial speech is distributed. As this Court explicitly stated in *Central Hudson*, however, while the First Amendment prohibits regulation based on content in most areas, content-based restrictions are permissible in regulating commercial speech. *Central Hudson*, 447 U.S. at 564 n.6.

The court of appeals' improper classification of commercial speech into different categories led the court to the erroneous conclusion that the City's decision to permit newspaper vending machines precludes Cincinnati from banning sidewalk dispensers for commercial handbills. Contrary to the court of appeals' view, however, Cincinnati is not required to prohibit newspaper vending machines as a precondition of prohibiting the distribution of commercial speech through boxes or racks placed on public property.

The First Amendment does not require a state or local government to choose between curing all of its aesthetic or safety problems or not addressing any of those problems at all. See *Taxpayers for Vincent*, 466 U.S. at 810-811; *Metromedia*, 453 U.S. at 511-512 (plurality decision).

B. Deference Is Due A Legislative Decision Concerning The Appropriate Scope Of Commercial Speech Regulations

Cincinnati could properly decide that, given the number of newspaper vending machines already permitted on the city sidewalks, it would not also allow commercial handbill dispensers to clutter the public right-of-way. The City has a legitimate concern that if dispensers of the kind used by respondents are allowed to remain in place they will soon proliferate to the point where they will cause major adverse effects on the City's appearance and on the free and safe flow of pedestrian and vehicular traffic. By ascribing significance to the fifteen hundred existing newspaper vending machines in comparison to respondents' sixty-two handbill dispensers, the court of appeals improperly refused to credit the City's reasons for its action. The court wrongly second-guessed the governmental officials charged with the responsibility for supervising Cincinnati's public property, and it ignored the obvious fact that respondents are only two of a virtually unlimited number of potential publishers of commercial handbills.

The court of appeals, in other words, improperly rebalanced the interests at stake and refused to "give the city the benefit of the doubt in close cases" Pet. App. 9a-10a n.8. The Sixth Circuit's approach is contrary to the deference this Court has shown for

legislative judgment calls concerning the appropriate scope of commercial speech regulation. This is particularly so in light of the absence of any showing in this case that respondents do not have ample alternative channels for the distribution of their commercial speech.

As this Court explained in *Fox*, the “reasonable fit” requirement does not call upon courts to conduct any rebalancing to achieve a tighter fit between the substantial governmental interest underlying the regulation and the means selected to achieve the goal.

What our decisions require is a “‘fit’ between the legislature’s end and the means chosen to accomplish those ends,” *Posadas*, 478 U.S., at 341—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is “in proportion to the interest served,” *In re R.M.J.*, [455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

492 U.S. at 480. This Court’s application of the “reasonable fit” element of the *Central Hudson/Fox* test makes it clear that courts are not permitted to second-guess a legislative judgment. *Id.* at 478-479; *see also Posadas*, 478 U.S. at 344.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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